

State of California
POTENTIALLY RESPONSIBLE PARTY
AGREEMENT
FOR: "OLD HAMMER FIELD"

30 July 1993

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STATE OF CALIFORNIA
AND THE
POTENTIALLY RESPONSIBLE PARTIES
FOR: "OLD HAMMER FIELD"

IN THE MATTER OF:

OLD HAMMER FIELD:

City of Fresno

National Guard Bureau

U.S. Army Corps of Engineers

Potentially Responsible
Party Agreement

Under

CERCLA/SARA, the NCP
California Health and,
Safety Code §§ 25355.5,
25353 and 25347.6

Based on the information available to the Parties on the effective date of this Potentially Responsible Party (PRP) Agreement (Agreement), and without any admission of any liability for the Site condition or without trial or adjudication of any issues of fact or law, or any Party waiving or having any rights of whatever nature limited in any way, except as expressly provided in this Agreement, the Parties agree as follows:

1. PURPOSE

1.1. The general purposes of this Agreement are to:

- (a) Ensure that the environmental impacts associated with past and present activities at the "Old Hammer Field" site are investigated;
- (b) Ensure that appropriate response action is taken as necessary to protect the public health and safety and the environment;
- (c) Establish a procedural framework and schedule for developing, implementing, and monitoring appropriate response actions at the Site in accordance with applicable law and other applicable promulgated requirements, and consistent with the priorities, guidelines, criteria, and regulations contained in the NCP;
- (d) Facilitate cooperation, exchange of information, and participation of the Parties in such action;
- (e) Ensure the adequate assessment of potential injury to natural resources and the prompt notification of and cooperation with the Federal and State Natural Resources Trustees necessary to guarantee

1 the implementation of response actions achieving appropriate
2 cleanup levels; and

3 (f) Recognize and reach compromise on perceived conflicts between
4 Parties under applicable laws and to preserve any rights,
5 immunities or entitlements each Party may have under applicable
6 laws and under this Agreement.
7

8 1.2. Specifically, the purposes of this Agreement are, as needed, to:

9 (a) Establish requirements for the performance of the response
10 actions including Preliminary Assessment / Site Inspection (PA/SI)
11 and Remedial Investigation (RI) to determine fully the nature and
12 extent of any threat to the public health and safety and the
13 environment caused by the release or threatened release of
14 hazardous substances, wastes, pollutants, or contaminants at the
15 Site and to establish requirements for the performance of a
16 Feasibility Study (FS) for the Site to identify, evaluate, and
17 select alternatives for the appropriate remedial action(s) to
18 prevent, mitigate, or abate the release or threatened release of
19 hazardous substances, wastes, pollutants, or contaminants at the
20 Site in accordance with applicable laws;

21 (b) Identify the nature, objective, and schedule of response
22 actions to be taken at the Site. Response actions at the Site
23 shall attain that degree of cleanup of hazardous substances,
24 wastes, pollutants or contaminants mandated by applicable laws;

25 (c) Implement the selected remedial action(s) in accordance with
26 applicable laws;

27 (d) Assure compliance, through this Agreement, with applicable
28 hazardous waste and water quality laws and regulations for matters
29 covered herein;

30 (e) Coordinate response actions at the Site recognizing the
31 importance of the Fresno Air Terminal and related defense
32 activities as the major air transportation carrier in the San
33 Joaquin Valley providing vital services to the public, including,
34 but not limited to, national defense and security and so as not to
35 interfere with other remedial actions at the site.

36 (f) Implement, in a timely manner, the cleanup process to the
37 extent consistent with protection of public health and safety and
38 the environment;

39 (g) Provide State involvement in the initiation, development,
40 selection and enforcement of remedial actions to be undertaken,
41 including the review of all applicable data as it becomes available

1 and the development of studies, reports, and action plans; and to
2 identify and integrate State ARARs and other applicable State laws
3 concerning removal and remedial action into the remedial action
4 process;

5 (h) Provide for operation and maintenance of any remedial action
6 selected and implemented pursuant to this Agreement; and

7 (i) Identify operable unit (OU) alternatives which are appropriate
8 at the Site prior to the implementation of final remedial action(s)
9 for the Site. OU alternatives shall be identified to the Parties
10 as early as possible prior to proposal of OUs to the State.
11

12 2. PARTIES

13

14 2.1. The Parties to this Agreement are the City of Fresno, National
15 Guard Bureau, U.S. Army Corps of Engineers (USACE), the Department of
16 Toxic Substances Control (DTSC), and the Regional Water Quality Control
17 Board (RWQCB). All other potentially responsible parties which may be
18 added to this Agreement subsequent to its execution are addressed in
19 Section 3 (Addition of Parties). The terms of the Agreement shall apply
20 to and be binding upon the Parties.
21

22 2.2. This Agreement shall be binding upon all of the Parties to this
23 Agreement. This Section shall not be construed as an agreement to
24 indemnify any person. All parties shall notify their agents, members,
25 employees, response action contractors for the Site, and all subsequent
26 owners, operators, and lessees of the Site of the existence of this
27 Agreement.
28

29 2.3. For the purposes of this Agreement, DTSC is the state lead agency
30 and the RWQCB is the state support agency. The DTSC and RWQCB will
31 perform the functions described in the Memorandum of Understanding
32 between the Department of Health Services (DHS), the State Water
33 Resources Control Board, and the Regional Water Quality Control Boards
34 for the Cleanup of Hazardous Waste Sites (1 August 1990), until such
35 time as it is terminated or superseded by another agreement between DTSC
36 and RWQCB. The Memorandum shall be made an attachment to this
37 Agreement. When reasonably necessary to effectuate this Agreement, the
38 State may change the State lead agency during the performance of this
39 Agreement. Such change of State lead agency is not subject to dispute
40 resolution, but may constitute good cause for extension under Section 11
41 of this Agreement. The State shall notify the other Parties of such

1 change of State lead agency within fourteen (14) days after the decision
2 is made.

3
4 2.4. Prior to issuance of comments by the State, DTSC and the RWQCB
5 shall compile the State's comments into one set of comprehensive
6 comments. The purpose of such compilation will be to: (1) coordinate
7 comments and (2) ensure consistency of the comments.

8
9 3. ADDITION OF PARTIES

10
11 3.1. The Response Entities defined in subsection (ae) (Definitions) is
12 not the comprehensive listing of PRPs for the site.

13
14 3.2. The Parties agree that additional Parties may be incorporated into
15 this Agreement, subsequent to its execution. In order to allow for
16 efficient incorporation of additional Parties into this Agreement, the
17 Parties agree to the following procedure.

18
19 3.3. Any of the Parties may provide information to DTSC which:
20 (a) recommends addition of a Party to this Agreement, and
21 (b) provides supporting documentation for such a recommendation.
22 Within forty-five (45) days of receipt of said recommendation, DTSC
23 shall notify the other Parties that DTSC shall:

24 (1) seek to incorporate the additional Party into this
25 Agreement pursuant to an Amendment to this Agreement, which
26 will require the additional Party, if a non-governmental
27 entity, to perform the obligations contained in this Agreement
28 (Appendix F), or if a governmental entity, to comply with the
29 terms of this Agreement to the same extent as the governmental
30 parties to this Agreement (Appendix G),

31 (2) pursue other applicable enforcement or legal action,
32 which will require the additional Party, if a non-governmental
33 entity, to perform the obligations contained in this
34 Agreement, or if a governmental entity, to comply with the
35 terms of this Agreement to the same extent as the governmental
36 parties to this Agreement, or

37 (3) not pursue the recommendations based upon de minimus
38 contribution, as set forth in subsection 7.5 of this Agreement
39 and CERCLA section 122.(g), of the additional Party to the
40 contamination at the Site. If DTSC chooses not to pursue the
41 recommendation for incorporation of an additional Party into

1 this Agreement, DTSC will provide the Response Entities with
2 a reasoned statement for such actions. The Response Entities
3 may challenge DTSC's decision, following the procedures set
4 forth in Section 14 (Dispute Resolution).
5

6 3.4. To expedite incorporation of additional Parties to this Agreement,
7 a standardized Amendment to this Agreement shall be used to amend this
8 Agreement. A "generic" standardized Amendment to this Agreement for
9 non-governmental entities is attached as Appendix F, a "generic"
10 standardized Amendment to this Agreement for governmental entities is
11 attached as Appendix G.
12

13 3.5. The Parties agree that by using Appendices F and G to incorporate
14 additional parties and amend this Agreement that only the Party being
15 added to the Agreement and DTSC must sign the Amendment for such
16 amendment to be effective.
17

18 3.6. If DTSC, under Section 3.3, chooses to pursue enforcement or legal
19 actions, such actions may include the issuance of an Imminent and/or
20 Substantial Endangerment Order (Example shown in Appendix E), Remedial
21 Action Order, or other actions consistent with Chapter 6.8 of the
22 California Health and Safety Code and action under Division 7 of the
23 California Water Code.
24

25 3.7. If the additional Party(ies) is(are) unwilling to be amended into
26 this Agreement, DTSC will pursue, in a timely manner, enforcement or
27 legal actions, as specified in subsection 3.6, above.
28

29 4. JURISDICTION 30

31 4.1. Each Party is entering into this Agreement pursuant to the
32 following authorities:

33 (a) The State of California enters into this Agreement pursuant to
34 Chapter 6.8 of Division 20 of the California Health and Safety
35 Code, Division 7 of the California Water Code, CERCLA/SARA, and the
36 NCP.

37 (b) The National Guard Bureau and the USACE enter into this
38 Agreement pursuant to CERCLA/SARA, the NCP, Executive Order (EO)
39 12580, and DERP.

40 (c) The City of Fresno enters into this Agreement pursuant to its
41 powers as a chartered city and municipal corporation and the

1 mandate of Chapter 6.8 of Division 20 of the California Health and
2 Safety Code and Division 7 of the California Water Code,
3 CERCLA/SARA and the NCP.
4

5 5. DEFINITIONS
6

7 5.1. Except as noted below or otherwise explicitly stated, the
8 definitions provided in the CERCLA/SARA, RCRA/HSWA, NCP, California
9 Health and Safety Code, California Water Code, and Titles 22 and 23 of
10 the California Code of Regulations shall control the meaning of terms
11 used in this Agreement. In the event of conflict in definitions
12 contained in California law, the identifying Party shall immediately
13 notify, in writing, the other Parties of the conflict, and allow the
14 Parties seven (7) days to provide written comment prior to the State's
15 resolution of the conflict. The State shall notify the other Parties of
16 its decision within fourteen (14) days after the conflict arose. Any
17 conflict between state and federal definitions is subject to the dispute
18 resolution process as provided in Section 14 of this Agreement.
19

20 (a) "Agreement" shall refer to this document and shall include all
21 Appendices to this document to the extent they are consistent with
22 the original Agreement as executed or modified.
23

24 (b) "ARARs" shall mean state and federal applicable or relevant
25 and appropriate requirements, standards, criteria, or limitations
26 selected in the manner set forth in section 121 of CERCLA. ARARs
27 shall apply in this same manner and to the same extent as are
28 applied to any non-governmental entity, facility, unit, or site, as
29 set forth in CERCLA section 120(a)(1), 42 U.S.C. section
30 9620(a)(1), subject to CERCLA section 121(d)(4), 42 U.S.C. section
31 9621(d)(4) and Executive Order 12580 sections 2(d) and (g).
32

33 (c) "CERCLA" or "CERCLA/SARA" shall mean the Comprehensive
34 Environmental Response, Compensation and Liability Act, Public Law
35 96-510, 42 U.S.C. section 9601 et seq., as amended by the Superfund
36 Amendments and Reauthorization Act of 1986, Public Law 99-499, and
37 any subsequent amendments.
38

39 (d) "City of Fresno" shall mean City of Fresno, its Department of
40 Airports, and their successors, and authorized representatives.
41

1 (e) "Days" shall mean calendar days, unless business days are
2 specified. Any submittal that under the terms of this Agreement
3 would be due on Saturday, Sunday, or State or Federal holiday shall
4 be due on the following business day. References herein to
5 specific numbers of days shall be understood to exclude the day of
6 occurrence.

7
8 (f) "DERA" shall refer to the Defense Environmental Restoration
9 Account, as defined in 10 U.S.C. section 2703, et seq. DERA is the
10 funding component of "DERP".

11
12 (g) "DERP" shall refer to the Defense Environmental Restoration
13 Program, as defined in 10 U.S.C. section 2701, et seq.

14
15 (h) "DSMOA" shall mean the Department of Defense and State
16 Memorandum of Agreement entered into by DOD and DHS on 31 May 1990
17 and any subsequent amendments.

18
19 (i). "DTSC" shall mean the Department of Toxic Substances Control,
20 its successors, and authorized representatives.

21
22 (j) "Feasibility Study" or "FS" shall have the same meaning as
23 provided in the California Health and Safety Code section 25314 and
24 NCP section 300.5. In the context of this agreement, it shall mean
25 a study conducted pursuant to state law and consistent with the NCP
26 which fully develops, screens and evaluates in detail remedial
27 action alternatives to prevent, mitigate, or abate the migration or
28 the release of hazardous substances, pollutants, or contaminants at
29 and from the Site.

30
31 (k) "Federal Facility" shall include the Fresno Air National Guard
32 Base and the Army National Guard Shields Avenue Facility and the
33 real property, located at FAT, subject to the jurisdiction of the
34 144th Fighter Interceptor Wing and/or Army National Guard Shields
35 Avenue Facility Commanding Officers, respectively, as identified in
36 Appendix C (Maps).

37
38 (l) "Fresno Air Terminal" or "FAT" shall mean the real property
39 subject to the jurisdiction of the City of Fresno, Department of
40 Airports as identified in Appendix C (Maps).

1 (m) "Meeting" in regard to Project Managers, shall mean an in-
2 person discussion at a single location or a conference telephone
3 call of all Project Managers.
4

5 (n) "National Contingency Plan" or "NCP" shall mean the
6 regulations contained in 40 CFR 300.1 et seq., and any amendments
7 thereto.
8

9 (o) "National Guard Bureau" shall mean U.S. Departments of the
10 Army and the Air Force, National Guard Bureau, its successors, and
11 authorized representatives. "National Guard Bureau" shall also
12 include the DOD, to the extent necessary to effectuate the terms of
13 this Agreement, including, but not limited to, appropriations and
14 Congressional reporting requirements.
15

16 (p) "Natural Resources Trustee" and "Federal or State Natural
17 Resource Trustee" shall have the same meaning as provided in CERCLA
18 and the NCP.
19

20 (q) "Natural Resources Trustee(s) Notification and Coordination"
21 shall have the same meaning as provided in CERCLA and the NCP.
22

23 (r) "Old Hammer Field" or "OHF" shall mean that real property
24 identified in Appendix C (Maps).
25

26 (s) "Operable Unit" or "OU" shall have the same meaning as
27 provided in the NCP.
28

29 (t) "Operation and Maintenance" shall mean activities required to
30 maintain the effectiveness of response actions.
31

32 (u) "Potentially Responsible Party" or "PRP" shall mean any
33 persons covered by CERCLA Section 107, 42 U.S.C. 9607, Chapter 6.8
34 of Division 20 of the California Health and Safety Code, Division 7
35 of the California Water Code, and other applicable law.
36

37 (v) "Preliminary Assessment / Site Inspection" or "PA/SI" shall
38 have the same meaning as provided in the NCP.
39

40 (w) "Promulgated" shall have the same meaning as provided in
41 section 300.400(g)(4) of the NCP.

1 (x) "RCRA" or "RCRA/HSWA" shall mean the Resource Conservation and
2 Recovery Act of 1976, Public Law 94-580, 42 U.S.C. section 6901 et
3 seq., as amended by the Hazardous and Solid Waste Amendments of
4 1984, Public Law 98-616, and any subsequent amendments.

5
6 (y) "Remedial Design" or "RD" shall have the same meaning as
7 provided in California Health and Safety Code section 25322.1 and
8 the NCP section 300.5.

9
10 (z) "Remedial Investigation" or "RI" shall have the same meaning
11 as in California Health and Safety Code section 25322.2 and the NCP
12 section 300.5. In the context of this agreement, it shall mean the
13 investigation conducted pursuant to State law and consistent with
14 the NCP. The RI serves as a mechanism for collecting data for site
15 evaluation and waste characterization and conducting treatability
16 studies as necessary to evaluate performance and cost of the
17 treatment technologies. The data gathered during the RI will also
18 be used to conduct a baseline risk assessment, perform a
19 feasibility study, and support design of a selected remedy.

20
21 (aa) "Remedy" or "Remedial Action" or "RA" shall have the same
22 meaning as provided in the NCP.

23
24 (ab) "Remedial Action Plan" (RAP) or "Record of Decision" (ROD)
25 shall mean a document approved by the State which shall include a
26 statement of reasons setting forth the basis for the response
27 actions selected. The statement shall include an evaluation of
28 each proposed alternative and shall also include an evaluation of
29 the consistency of the proposed response actions with CERCLA/SARA,
30 the NCP and Section 25356.1(c) of the California Health and Safety
31 Code.

32
33 (ac) "Remove" or "Removal" shall have the same meaning as provided
34 in the NCP.

35
36 (ad) "Respond" or "Response" shall have the same meaning as
37 provided in the NCP.

38
39 (ae) "Response Entity" or "Response Entities" shall mean the
40 National Guard Bureau, USACE, and the City of Fresno, as defined
within this Section, and any additional party incorporated into

1 this Agreement by an Amendment to this Agreement pursuant to
2 subsection 3.3.

3
4 (af) "RWQCB" shall mean the Regional Water Quality Control Board,
5 Central Valley Region, its successors, and authorized
6 representatives.

7
8 (ag) "Site" shall mean the area set forth as "Old Hammer Field"
9 (OHF) on the map included as Appendix C and any area off OHF to or
10 under which a release of hazardous substances has migrated, or
11 reasonably threatens to migrate, from a source on or at OHF. For
12 the purposes of obtaining permits, the terms "on-site" and "off-
13 site" shall have the same meaning as provided in the NCP, and "off-
14 site" shall mean all locations that are not "on-site". The Site
15 boundary may be modified based on information provided by the
16 Response Entities demonstrating that those portions of the Site
17 proposed for deletion do not require additional response actions.

18
19 (ah) "State", for the purposes of this Agreement, shall refer to
20 both DTSC, as the lead agency, and the RWQCB, as the support
21 agency, or their employees, authorized representatives, and
22 successors, unless otherwise specified.

23
24 (ai) "USACE" shall mean U.S. Army Corps of Engineers, its
25 successors, and authorized representatives. "USACE" shall also
26 include the Department of Defense (DOD), to the extent necessary to
27 effectuate the terms of this Agreement, as it relates to the
28 Formerly Used Defense Sites (FUDS) Component of the DERP including,
29 but not limited to, appropriations and Congressional reporting
30 requirements.

31 32 6. DETERMINATIONS

33
34 6.1. The Fresno Air National Guard Base and "Old Hammer Field"/Fresno
35 Air Terminal, Fresno County, California, were placed on the Site
36 Mitigation Annual Workplan list on January 1, 1990, and January 1, 1991,
37 respectively, as provided in section 25356 of the California Health and
38 Safety Code.

39
40 6.2. The Fresno Air National Guard Base and Army National Guard Shields
41 Avenue Facility are facilities under the jurisdiction, control, or

1 custody of the U.S. Department of Defense within the meaning of
2 Executive Order 12580, 52 Federal Register 2923, 29 January 1987 (E.O.
3 12580).

4
5 6.3. The Fresno Air National Guard Base and Army National Guard Shields
6 Avenue Facility are federal facilities under the jurisdiction of the
7 Secretary of Defense within the meaning of CERCLA section 120 and SARA
8 section 211, and subject to the Defense Environmental Restoration
9 Program (DERP), 10 U.S.C. Section 2701 et seq.

10
11 6.4. For the purposes of this Agreement, the National Guard Bureau is
12 the authorized delegate of the President of the United States under E.O.
13 12580, and the USACE is the authorized delegate of the Department of
14 Defense under the DERP, for receipt of notification by the State of its
15 ARARs in the manner set forth in CERCLA section 121(d)(2)(A)(ii), 42
16 U.S.C. section 9621(d)(2)(A)(ii) and the NCP.

17
18 6.5. The Authority of the National Guard Bureau to exercise the
19 delegated authority of the President of the United States pursuant to
20 CERCLA and E.O. 12580, is not altered by this Agreement, except to the
1 extent mandated by CERCLA section 120(a).

22
23 6.6. Old Hammer Field is a Formerly Used Defense Site (FUDS) and is
24 subject to the Defense Environmental Restoration Program 10 U.S.C.
25 section 2701 et seq.

26
27 6.7. The actions to be taken, pursuant to this Agreement, shall be
28 those that are reasonable and necessary to protect the public health and
29 safety and the environment.

30
31 6.8. There have been releases or threatened releases of hazardous
32 substances, pollutants, or contaminants at the Site into the environment
33 within the meaning of section 25320 of the California Health and Safety
34 Code and the NCP, and discharges or threatened discharges of waste
35 within the meaning of Division 7 of the California Water Code.

36
37 6.9. With respect to these releases or threatened releases, the
38 Response Entities are, were, or have agreed to be treated as owner(s)
39 and/or operator(s) within the meaning of California Health and Safety
40 Code section 25323.5(a). Response Entities are person(s) within the

1 meaning of Division 7 of the California Water Code and California Health
2 and Safety Code section 25118.

3
4 6.10. In accordance with Section 300.600(b)(3) of the NCP and Section
5 107(f) of CERCLA, 42 U.S.C. section 9707(f), the Secretary of Defense is
6 the trustee for natural resources located on, over, or under the Federal
7 Facilities, to the extent such natural resources are not specifically
8 entrusted to the Secretary of Commerce or the Secretary of the Interior.

9
10 7. COST ALLOCATION

11
12 7.1. The Parties recognize that the Response Entities and other PRPs
13 are liable for the costs of cleanup of the contamination found on the
14 Site, as well as for the State's oversight costs (See Section 33) to the
15 extent required by CERCLA/SARA and applicable State law.

16
17 7.2. However, it is recognized that the Response Entities and other
18 PRPs may not have contributed to the contamination on an equal basis.
19 Therefore, the State agrees to prepare a non-binding preliminary
20 allocation of responsibility among all of the identifiable potentially
21 responsible parties at the site, including those parties which may have
22 been released, or may otherwise be immune from liability under CERCLA,
23 Chapter 6.8 of Division 20 of the California Health and Safety Code, or
24 Division 7 of the California Water Code. The non-binding preliminary
25 allocation of responsibility shall be prepared by the State as part of
26 the RAP/ROD approval process. The non-binding preliminary allocation of
27 responsibility will be subject to review and comment by the Parties and
28 will be subject to Dispute Resolution (Section 14).

29
30 7.3. Any Response Entity or combination of Response Entities with an
31 aggregate alleged liability in excess of fifty percent (50 %) of the
32 costs of response actions may request that an arbitration panel (Panel),
33 pursuant to section 25356.2 et seq. of the California Health and Safety
34 Code, be convened by agreeing to submit to binding arbitration. The
35 Panel shall, and the Response Entities are entitled to, address the
36 proper apportionment of liability.

37
38 7.4. The Panel shall apportion liability for the costs of all removal
39 and remedial action specified in the Final RAP (ROD) and all oversight
40 costs identified by the State pursuant to Section 33 (State Support
41 Services and Oversight Costs).

1 7.5. The Panel shall determine liability for the costs of response
2 actions and State oversight costs and shall apportion these costs among
3 all of the potentially responsible parties, regardless of whether those
4 parties are before the panel or not. The panel shall apportion
5 liability based on the following criteria:

6 (a) The amount of hazardous substance for which each party may be
7 responsible.

8 (b) The degree of toxicity of the hazardous substance.

9 (c) The degree of involvement of the potentially responsible
10 parties in the generation, transportation, treatment, or disposal
11 of the hazardous substance.

12 (d) The degree of care exercised by the potentially responsible
13 parties with respect to the hazardous substance, taking into
14 account the characteristics of the substance.

15 (e) The degree of cooperation by the potentially responsible
16 parties with federal, state, and local officials to prevent harm to
17 human health and the environment.
18

19 7.6. The Parties reserve whatever rights are available to them under
20 applicable law in the event that the panel is unable to determine the
21 apportionment of liability for the costs of cleanup and State oversight
22 costs. Those Parties not submitting themselves to binding arbitration
23 under this Section reserve whatever rights are available to them under
24 applicable law or under this Agreement.
25

26 8. WORK TO BE PERFORMED

27

28 8.1. The Parties agree to perform the tasks, obligations and
29 responsibilities described in this Section in accordance with applicable
30 laws and consistent with the priorities, guidelines, criteria, and
31 regulations in the NCP, and in accordance with all terms and conditions
32 of this Agreement.
33

34 8.2. The Response Entities agree, consistent with their authorities
35 under applicable law, to undertake, seek adequate funding for, fully
36 implement and report on activities needed to complete the investigation
37 and remediation of phases for each OU at the Site, consistent with the
38 NCP, as set forth in Appendix A. The identified phases for each
39 individual OU response actions are:

40 (a) Preliminary Assessment / Site Investigation;

(b) Remedial Investigation / Feasibility Study;

- 1 (c) Remedial Action Plan / Record Of Decision;
- 2 (d) Remedial Design / Remedial Action;
- 3 (e) Operation and Maintenance; and
- 4 (f) Federal and State Natural Resources Trustees notification and
- 5 coordination.

6 Within sixty (60) days of State approval of each completed phase at an
7 OU, the Response Entities shall propose timetables, deadlines,
8 schedules, and responsibilities for the next phase. The timetables,
9 schedules, deadlines, and responsibilities shall be jointly prepared and
10 finalized pursuant to Section 10 (Schedules) and shall be incorporated
11 as an amendment to Appendix A.

12

13 8.3. The Response Entities agree to:

- 14 (a) Exercise their best efforts to implement, in a timely manner,
- 15 the initiation of response actions for the Sites; and
- 16 (b) Exercise their best efforts to carry out all activities under
- 17 this Agreement so as to protect the public health and safety and
- 18 the environment.

19

20 8.4. The State agrees to provide any Party with assistance in obtaining
21 and interpreting guidance relevant to the implementation of this
22 Agreement.

23

24 8.5. In the event that any work required to be performed, or any
25 document required to be prepared, pursuant to this Agreement, is to be
26 performed or prepared by a contractor of the Response Entities, such
27 contractor, as appropriate to the type of work or document required,
28 shall be either a registered geologist in the State of California or a
29 licensed professional engineer. All deliverable document(s) submitted
30 to the State will require the document be stamped and signed by the said
31 registered / licensed professional. Exceptions in writing, may be
32 granted by the State with reasonable explanation by the requesting Party
33 and for the specific document(s).

34

35 8.6. The Parties recognize that this Agreement does not obligate the
36 Response Entities to perform or fund any response action for
37 contamination originating off the Site. Any discovered release of
38 hazardous substances determined to have originated off the Site and to
39 have migrated to or under the Site, including groundwater plumes
40 determined to have originated off the Site and to have commingled with
41 plumes on the Site, shall be addressed by a separate agreement between

1 the responsible party(ies) and appropriate regulatory agencies of the
2 State insofar as any response action is required to be performed or
3 funded off the Site. Such separate agreement shall be compatible with
4 and consistent with the response actions undertaken or to be undertaken
5 pursuant to this Agreement. Such separate agreement shall not affect
6 the rights and obligations of DTSC to incorporate additional parties to
7 this agreement, or to pursue enforcement or legal action against
8 potentially responsible parties, pursuant to Section 3 of this
9 Agreement, in order to effectuate response actions on the Site.

10

11 8.7. The Parties agree that the response activities performed, pursuant
12 to this Agreement or related enforcement Orders, shall be apportioned
13 between the Response Entities and other PRPs in a manner that will: (a)
14 ensure that all necessary investigation activities are conducted and (b)
15 that duplicate efforts are minimized. Specific responsibilities are
16 specified in Appendix A of this Agreement. Appendix A may be amended as
17 specified in Section 29 (Amendment or Modification of Agreement).

18

19 8.8. The Parties agree, subject to Dispute Resolution (Section 14),
20 that if the PA/SI and/or OU RI/FS indicate that no additional response
21 actions are necessary at: (1) a specified suspected contaminant source
22 area, and/or (2) an OU, and/or (3) any other portion of the Site not
23 identified as a potential source of contamination, then completion of
24 the tasks specified in subsection 8.2 will be deferred. The requirement
25 for completion of the tasks specified in subsection 8.2 will not be
26 discharged until a final comprehensive site-wide RAP/ROD supports and
27 documents the original individual PA/SI and/or OU RI/FS recommendations
28 for "no additional response actions."

29 (a) Upon request of a Response Entity, the State will confirm in
30 writing that, based upon the information generated by the Response
31 Entity(ies), no additional response actions are required.

32 (b) If the State disagrees that no additional response actions are
33 required, the State will provide a written statement of reasons
34 supporting their decision.

35

36 8.9. The Parties agree that the Response Entity(ies) seeking to develop
37 a portion of the site, not already identified as a potential source of
38 contamination in the PA/SI and/or RI/FS, will be responsible for
39 determining that the proposed use will be consistent with the protection
40 of the public health and safety and the environment. If during site
development, contamination or a potential area of contamination is

1 identified, the Response Entities shall notify the State, within five
2 (5) days, of the existence of the condition. Further actions at that
3 site will be consistent with the applicable sections of this Agreement.
4

5 9. REVIEW AND APPROVAL 6

7 9.1. The provisions of this Section establish the procedures that shall
8 be used by the Parties to provide each other with appropriate technical
9 support, notice, review, comment, approval by the State and response to
10 comments regarding PA/SI, RI/FS, and RD/RA documents, specified herein
11 as either primary or secondary documents. In accordance with CERCLA
12 sections 120 and 121, DERP, and the NCP, the Response Entities will be
13 responsible for preparing and distributing primary and secondary
14 documents. For documents in which more than one Response Entity is
15 involved, the responsibility for document preparation shall be
16 established in Appendix A of this Agreement. As of the effective date
17 of this Agreement, all draft, draft final and final deliverable
18 documents identified herein shall be prepared, distributed and subject
19 to dispute resolution in accordance with subsections 9.2 through 9.11
20 below. The designation of a document as "draft" or "final" is solely
21 for purposes of review and approval by the State in accordance with this
22 Section. Such designation does not affect the obligation of the Parties
23 to issue documents, which may be referred to herein as "final", to the
24 public for review and comment as appropriate and as required by law.
25

26 9.2. General Process for PA/SI, RI/FS, and RD/RA documents:

27 (a) Primary documents include those reports that are major,
28 discrete, portions of PA/SI, RI/FS, and/or RD/RA activities.
29 Primary documents are initially issued by the Response Entities in
30 draft subject to review and approval by the State. Within sixty
31 (60) days following receipt of comments on a particular draft
32 primary document, the Response Entities will respond to the
33 comments received and issue a draft final primary document subject
34 to dispute resolution. The draft final primary document will
35 become the final primary document either thirty (30) days after the
36 receipt by the State of a draft final document if dispute
37 resolution is not invoked or as modified by decision of the dispute
38 resolution process.

39 (b) Secondary documents include those reports that are discrete
40 portions of the primary documents and are typically input or feeder
41 documents. Secondary documents are prepared by the Response

1 Entities in draft subject to review and approval by the State.
2 Although the Response Entities will respond to comments received,
3 the draft secondary documents may be finalized in the context of
4 the corresponding primary documents. A secondary document may be
5 disputed at the time the corresponding draft final primary document
6 is issued.
7

8 **9.3. Primary Documents:**

9 (a) The Response Entities shall complete and transmit drafts of
10 the following primary documents for each OU and for the final
11 remedy to the State, for review, comment, and approval in
12 accordance with the provisions of this section; provided, however,
13 that the Response Entities need not complete a draft primary
14 document for an OU if: (i) the same primary document completed or
15 to be completed with respect to another OU covers all topics
16 relevant to the OU at issue and (ii) the Parties agree in writing
17 that such draft primary documents need not be completed or (iii)
18 the potential source of contamination or OU meets the conditions
19 specified in subsection 8.8.

20 (1) PA/SI Workplans, including Sampling Schedules and
21 Analysis Plans

22 (2) PA Reports

23 (3) SI Reports

24 (4) RI/FS Workplans, incorporating

25 (i) Sampling Schedules

26 (ii) Sampling Analysis Plans

27 (iii) Quality Assurance Project Plans (QAPP)

28 (iv) Data Quality Objectives

29 (v) Baseline Risk Assessment Work Plan

30 (5) Public Participation Plan (PPP) or Community Relations
31 Plan (CPR)

32 (6) RI/FS Reports, including Baseline Risk Assessment

33 (7) Proposed Plans

34 (8) Remedial Action Plans (RAPs)

35 (9) Remedial Action Workplans, and

36 (10) Operation and Maintenance Plans

37 (b) Only the draft final of primary documents shall be subject to
38 dispute resolution. The Response Entities shall complete and
39 transmit draft primary documents in accordance with the timetable
40 and deadlines established in Section 10 (Schedule) of this
Agreement.

1 (c) Primary documents may include target dates for subtasks,
2 including those described in subsections 9.4.(b) and 19.3. The
3 purpose of target dates is to assist the Response Entities in
4 meeting deadlines, but target dates do not become enforceable by
5 their inclusion in the primary documents and are not subject to
6 Section 10 (Schedule), Section 11 (Extensions) or Section 15
7 (Enforceability).

8 (d) If a draft final primary document is prepared by a contractor
9 of the Response Entities, such draft final primary document must be
10 signed by, as appropriate to the type of document prepared, either
11 a geologist registered in the State of California or a licensed
12 professional engineer.
13

14 9.4. Secondary Documents:

15 (a) The Response Entities shall complete and transmit drafts of
16 the following secondary documents for each OU and for the final
17 remedy to the State for review, and comments; provided, however,
18 that the Response Entities need not complete a draft secondary
19 document for an OU if: (i) the same secondary document or a primary
20 document completed or to be completed with respect to another OU
21 covers all topics relevant to the OU at issue, and (ii) the Parties
22 agree in writing that such draft secondary document need not be
23 completed, or (iii) the potential source of contamination or OU
24 meets the conditions specified in subsection 8.8. The Response
25 Entities shall identify the corresponding primary documents when
26 submitting the secondary document for State review and comment.

27 (1) Sampling and Data Results

28 (2) Treatability Studies (only if generated)

29 (3) Remedial Designs (RDs)

30 (4) Health and Safety Plans

31 (b) Although the State may comment on the drafts for the secondary
32 documents listed above, such documents shall not be subject to
33 dispute resolution except as provided by subsection 9.2 hereof.
34 Target dates for the completion and transmission of draft secondary
35 documents shall be established by the Project Managers. The
36 Project Managers also may agree upon additional secondary documents
37 that are within the scope of the listed primary documents.
38

39 9.5. The State will provide the Response Entities with a California
40 Environmental Quality Act (CEQA) Compliance Plan. The Response Entities

1 agree to cooperate and coordinate with the State in complying with the
2 requirements of CEQA, and in completing the appropriate CEQA documents.
3

4 9.6. With regards to this particular Site, documents not identified in
5 subsections 9.3 or 9.4 above, will be classified as Secondary Documents
6 unless otherwise mutually agreed by the Project Managers.
7

8 9.7. The Project Managers shall participate in the meeting held every
9 quarter (approximately every ninety (90) days), except as otherwise
10 agreed by the Parties, to review and discuss the progress of work being
11 performed at the Site, including progress on the primary and secondary
12 documents. However, progress meetings may be held more frequently as
13 needed upon request by any Project Manager. Prior to preparing any
14 draft document specified in subsections 9.3 and 9.4 above, the Project
15 Managers of the Authoring Party, as specified in subsection 9.9(a), and
16 the State, at a minimum, may participate in a meeting in an effort to
17 reach a common understanding with respect to the contents of the draft
18 document.
19

20 9.8. Identification and Determination of Potential ARARs:

21 (a) The State will contact in writing those State and local
2 government agencies that are potential sources of ARARs in a timely
23 manner as set forth in NCP section 300.515(d).
24

25 (b) Prior to the issuance of draft primary or secondary documents
26 for which ARARs determinations are appropriate, the Project
27 Managers shall meet to identify and propose all potential pertinent
28 ARARs, including any permitting requirements that may be a source
29 of ARARs. At that time and within the time period described in NCP
30 section 300.515(h)(2), the State shall submit the ARARs obtained
31 pursuant to subsection 9.8.(a) to the Response Entities' Project
32 Managers along with a list of agencies that failed to respond to
33 the State's solicitation of ARARs and copies of the solicitations
34 and any related correspondence.

35 (c) The Response Entities will prepare draft ARARs determinations
36 in accordance with CERCLA section 121(d)(2), 42 U.S.C. section
37 9621(d)(2), the NCP, and pertinent guidance issued by the State.

38 (d) In identifying potential ARARs, the Parties recognize that
39 actual ARARs can be identified only on a site-specific basis and
40 that ARARs depend on the specific hazardous substances, pollutants,
and contaminants at a site, the particular actions associated with
a proposed remedy and the characteristics of a site. The Parties

1 recognize that ARARs identification is necessarily an iterative
2 process and that potential ARARs must be identified and discussed
3 among the Parties as early as possible, and must be reexamined
4 throughout the RI/FS process until the final remedial action is
5 selected and approved.

6 (e) The Parties recognize that under CERCLA section 120(a)(4),
7 State laws concerning removal/remedial actions may apply to this
8 site.
9

10 9.9. Review and Comment on Draft Documents:

11 (a) The Response Entity which authors (hereinafter the Authoring
12 Party) shall complete and transmit each draft primary document to
13 the State on or before the corresponding deadline established for
14 the issuance of the document. The Authoring Party shall complete
15 and transmit the draft secondary documents in accordance with the
16 target dates established for the issuance of such documents. The
17 Authoring Party shall also transmit to the other parties to this
18 agreement a copy of the draft primary and/or secondary documents.

19 (b) Unless the Parties mutually agree to another time period, all
20 draft documents shall be subject to a sixty (60) day period for
21 review, and comment, and approval for primary documents by the
22 State. Review of any document by the State may concern all aspects
23 of it (including completeness) and shall include, but not be
24 limited to, technical evaluation of any aspect to the document, and
25 conformance to applicable law, CERCLA/SARA, the NCP and any
26 pertinent promulgated regulation, guidance, or policy issued by the
27 State and U.S. Environmental Protection Agency (EPA). Comments by
28 the State shall be provided with adequate specificity so that the
29 Authoring Party may respond to the comment and, if appropriate,
30 make changes to the draft document. Comments shall refer to any
31 pertinent sources of authority or references upon which the
32 comments are based and, upon request of the Authoring Party or
33 another Party, as appropriate, the State shall provide a copy of
34 the cited authority or reference. In cases involving complex and
35 unusually lengthy reports, the State may extend the sixty (60) day
36 comment period for an additional thirty (30) days by written notice
37 to the Authoring Party prior to the end of the sixty (60) day
38 period. In appropriate circumstances, this time period may be
39 further extended with consultation of the Response Entities in
40 accordance with Section 11 (Extensions). On or before the close of
41 the comment period, the State shall transmit its written comments

1 to the Authoring Party. The State shall also transmit to the other
2 parties to this Agreement a copy of the comments on the draft
3 primary and/or secondary documents.

4 (c) Representatives of the Authoring Party shall make themselves
5 readily available to the State during the comment period for
6 purposes of informally responding to questions and comments on
7 draft documents. Oral comments made during such discussions need
8 not be the subject of a written response by the Authoring Party on
9 the close of the comment period.

10 (d) The Other Parties to this Agreement may choose to provide
11 comments to the Authoring Party. Those comments are to be
12 submitted to the Authoring Party, the State and the remaining
13 Parties in accordance with the time-frames specified subsection
14 9.9.(b), above. The Other Party(ies) may extend the sixty (60) day
15 comment period upon approval of the State. Review of any document
16 by the Other Parties may concern technical evaluation of any aspect
17 to the document.

18 (e) In commenting on a draft document which contains a proposed
19 ARARs determination, the State shall include a statement of whether
20 it objects to any portion of the proposed ARARs determination. To
21 the extent that the State does object, it shall explain the basis
2 for its objection in detail and shall identify any ARARs which it
23 believes were not properly addressed in the proposed ARARs
24 determination.

25 (f) Following the close of the comment period for a draft
26 document, the Authoring Party shall give consideration to all
27 written comments. If any of the Parties request, within fifteen
28 (15) days following the close of the comment period on a draft
29 secondary document or draft primary document, the Parties may hold
30 a meeting to discuss all comments received. On a draft secondary
31 document the Authoring Party shall, within sixty (60) days of the
32 close of the comment period, transmit to the State its written
33 response to the comments received. On a draft primary document the
34 Authoring Party shall, within sixty (60) days of the close of the
35 comment period, transmit to the State a draft final primary
36 document, which shall include the Authoring Party response to all
37 written comments received within the comment period.

38 (g) The Authoring Party may extend the sixty (60) day period for
39 either responding to comments on a draft document or for issuing
40 the draft final primary document for an additional thirty (30) days
by providing written notice to the State. In appropriate

1 circumstances, this time period may be further extended in
2 accordance with Section 11 (Extensions).
3

4 9.10. Availability of Dispute Resolution for Draft Final Primary
5 Documents:

6 (a) Dispute resolution shall be available to the Parties for draft
7 final primary documents as set forth in Section 14 (Dispute
8 Resolution).

9 (b) When dispute resolution is invoked on a draft final primary
10 document, work may be stopped in accordance with the procedures set
11 forth in subsection 14.12 regarding dispute resolution.
12

13 9.11. The draft final of a primary document shall serve as the final
14 primary document if no Party invokes dispute resolution regarding the
15 document or, if invoked, at completion of the dispute resolution process
16 should the Authoring Party's position be sustained. If the Authoring
17 Party's determination is not sustained in the dispute resolution
18 process, the Authoring Party shall prepare, within not more than sixty
19 (60) days, a revision of the final draft document which conforms to the
20 results of dispute resolution. In appropriate circumstances, the time
21 period for this revision period may be extended in accordance with
22 Section 11 (Extensions).
23

24 9.12. Following finalization of any primary document generated prior to
25 the selection of the final response action(s) (i.e. approval of the
26 final comprehensive Site-wide RAP/ROD) and in accordance with subsection
27 9.9 above, any Party may seek to supplement the document including
28 seeking additional field work, pilot studies, computer modeling or other
29 supporting technical work, only as provided in subparagraphs (a) and (b)
30 below. (These restrictions do not apply to the Public Participation
31 Plan / Community Relations Plan.)

32 (a) Any Party may seek to supplement a document after finalization
33 by submitting a concise written request to the State and copies of
34 the request to the other Parties. The request shall specify the
35 nature of the requested supplemental addendum and how the request
36 is appropriate under subsection 9.12(b) (1) and (2), below. The
37 State shall review the request and issue a determination on the
38 request within sixty (60) days of receipt.

39 (b) In the event the requesting Party and/or the Authoring Party
40 do not agree with the State's determination, the Party may invoke
41 dispute resolution to determine if such a supplemental addendum

1 shall be conducted. A supplemental addendum to a document shall be
2 required only upon a showing that:

3 (1) The requested addendum is based on information that is
4 (a) new (i.e., information that becomes available or known
5 after the document was finalized) and (b) significant; and

6 (2) The requested addendum could be of significant assistance
7 in evaluating impacts on the public health or safety or the
8 environment, in evaluating the selection of remedial
9 alternatives, or in protecting public health and safety and
10 the environment.

11 (c) Nothing in this Section shall alter the State's ability to
12 request the performance of additional work which was not
13 contemplated by this Agreement. The Authoring Party's obligation
14 to perform such work under this Agreement must be established by
15 either a supplemental addendum of the document or by amendments to
16 this Agreement.

17 (d) Supplemental addendum to a document following the selection of
18 the final response action(s) (i.e. approval of the final
19 comprehensive Site-wide RAP/ROD) will be handled as specified in
20 Section 27 (Five Year Review) of this Agreement.
21

2 10. SCHEDULES

23
24 10.1. All deadlines agreed upon before the effective date of this
25 Agreement shall be made in Appendix B in this Agreement. To the extent
26 that deadlines have already been mutually agreed upon by the Parties
27 prior to the execution of this Agreement, they will satisfy the
28 requirements of this Section and remain in effect in accordance with
29 Subsection 10.2, and shall be incorporated into the appropriate work
30 plans.
31

32 10.2. Within twenty-one (21) days of the effective date of this
33 Agreement, the Response Entities shall propose, as applicable, deadlines
34 for completion of the following draft primary documents for those
35 operable units identified as of the effective date of this Agreement and
36 for the final remedy:

- 37 (a) PA Reports;
- 38 (b) SI Reports;
- 39 (c) RI / FS Workplans;
- 40 (d) RI Reports;
- 41 (e) FS Reports;

- 1 (f) Remedial Action Plans / Record of Decisions;
2 (g) Community Relations Plan; and
3 (h) Sampling and Analysis Plans, and target dates for associated
4 tasks.

5
6 10.3. These deadlines shall be proposed and finalized using the same
7 procedure set forth in subsection 10.5, below.

8
9 10.4. Within sixty (60) days of the State's approval of each OU SI
10 Workplan, as set forth in Appendix A, the Response Entities shall
11 propose deadlines for completion of the following draft primary
12 documents for the OU site remediation activities identified as of the
13 effective date of this Agreement:

- 14 (a) SI Reports

15
16 10.5. Within fifteen (15) days of receipt, the State, shall review and
17 provide comments to the Response Entities regarding the proposed
18 deadlines. Within fifteen (15) days following receipt of the comments
19 the Response Entities shall, as appropriate, make revisions and reissue
20 the proposal. The Parties shall meet as necessary to discuss and
21 finalize the proposed deadlines. All agreed-upon deadlines shall be
22 incorporated into the appropriate workplans. If the State and the
23 Response Entities proposing the schedule fail to agree within thirty
24 (30) days on the proposed deadlines, the matter shall immediately be
25 submitted for dispute resolution pursuant to Section 14 (Dispute
26 Resolution). The final deadlines established pursuant to this
27 subsection shall be enforceable by the State to the extent provided in
28 applicable state and federal laws, and shall become incorporated into
29 Appendix B to this Agreement.

30
31 10.6. Within sixty (60) days of the State's approval of the PA/SI for
32 each OU, as specified in Appendix A, the Response Entities shall propose
33 deadlines for completion of the following draft primary documents:

- 34 (a) RI and FS Workplans, including Sampling and Analysis Plans
35 (b) Quality Assurance Project Plans (QAPPs)
36 (c) RI Reports
37 (d) FS Reports
38 (e) Health and Safety Plans

1 10.7. Within sixty (60) days of the State's approval of each OU RI/FS, .
2 the Response Entities shall propose deadlines for completion of the
3 following draft primary documents:

- 4 (a) Revised Public Participation Plans or Community Relations Plan
- 5 (b) Remedial Action Plan (RAP) Document

6
7 10.8. Within sixty (60) days of the State's approval of each OU
8 Remedial Action Plan in accordance with section 25356.1 of the
9 California Health and Safety Code and consistent with the NCP, the
10 Response Entities shall propose deadlines for completion of the
11 following draft primary documents:

- 12 (a) Remedial Design
 - 13 (1) Field Investigation for Remedial Design.
 - 14 (2) Plans and Specifications

15
16 10.9. Within sixty (60) days of the State's approval of the RD, the
17 Response Entities shall propose deadlines for completion of the
18 following draft primary documents:

- 19 (a) O & M Plans
- 20 (b) RA Construction Schedule
- 21 (c) Remedial Action Work Plans

2
23 10.10. The subsections 10.6 to 10.9 requiring proposed deadlines will
24 not preclude any early proposals or phased submittals to the State.

25
26 10.11. These deadlines shall be proposed and finalized using the same
27 procedures set forth in subsection 10.5, above.

28
29 10.12. For any OUs not identified for RI/FS as of the effective date of
30 this Agreement, the Response Entities shall propose deadlines consistent
31 with the procedure set in this Section. All documents listed in
32 subsections 9.3 through 9.3.(a)(10) (with the exception of the Public
33 Participation Plan and any document that comes within the provision to
34 such subsection) shall have deadlines proposed within sixty (60) days of
35 agreement on the proposed OU by all Parties. These deadlines shall be
36 proposed and finalized using the procedures set forth in subsection
37 10.5.

38
39 10.13. The deadlines set forth in this Section, or to be established as
40 set forth in this Section, may be extended pursuant to Section 11
(Extensions). The Parties recognize that one possible basis for

1 extension of the deadlines for completion of the Remedial Investigation
2 and Feasibility Study Reports is the identification of significant new
3 Site conditions during the performance of the remedial investigation.
4

5 11. EXTENSIONS

6

7 11.1. Timetables, deadlines and schedules of Response Entities will be
8 extended by the State when good cause is shown. Except as provided for
9 in subsection 11.9, written request for an extension shall be received
10 by the State, if possible, a minimum of seven (7) days prior to the
11 compliance date. Any request for extension by a Party shall be
12 submitted in writing to the State and copies provided to the other
13 Parties and shall specify:

- 14 (a) The timetable, deadline or schedule that is sought to be
15 extended;
- 16 (b) The length of the extension sought;
- 17 (c) The good cause(s) for the extension; and
- 18 (d) The extent to which any related timetable and deadline or
19 schedule would be affected if the extension were granted.
20

21 11.2. The Parties agree, examples of good cause for an extension are:

- 22 (a) An event of Force Majeure;
- 23 (b) A delay caused by another Party's or PRP's failure to meet or
24 fund any requirement of this Agreement or related Order;
- 25 (c) A delay caused by the good faith invocation of dispute
26 resolution or the initiation of judicial action;
- 27 (d) A delay caused, or which is likely to be caused, by an
28 extension in regard to another timetable and deadline or schedule;
- 29 (e) A delay caused by the need to respond to unusually extensive
30 public comments during a public comment period required under
31 applicable law or the NCP (including the Parties agreement to
32 perform additional work);
- 33 (f) Any work stoppage within the scope of Section 13 (Emergencies
34 and Removals);
- 35 (g) The incorporation of additional Parties to this Agreement
36 which results in a delay;
- 37 (h) A delay caused by a change of State lead agency;
- 38 (i) A delay caused by refusal of a land owner to grant right of
39 entry to a Response Entity; or
- 40 (j) Any other event or series of events mutually agreed to by the
41 Parties as constituting good cause.

1 11.3. Absent the State's agreement on the existence of good cause, the
2 Requesting Party may seek and obtain a determination through the dispute
3 resolution process that good cause exists.
4

5 11.4. Except as provided for in subsections 11.9 and 11.10, within four
6 (4) business days of receipt of a request, the State shall advise the
7 requesting Party via facsimile, followed in writing of the State's
8 position on the request. Any failure by the State to respond within the
9 four-day period shall be deemed to constitute concurrence with the
10 request for extension. If the State does not concur with the requested
11 extension, it shall include in its statement of nonconcurrence an
12 explanation of the basis for its position.
13

14 11.5. If the State agrees that the requested extension is warranted,
15 the requesting Party shall extend the affected timetable and deadline or
16 schedule accordingly. If the State does not agree as to whether all or
17 part of the requested extension is warranted, the timetable and deadline
18 or schedule shall not be extended except in accordance with a
19 determination resulting from the dispute resolution process.
20

21 11.6. Within seven (7) days of receipt of a statement of nonconcurrence
22 with the requested extension, the requesting Party may invoke dispute
23 resolution.
24

25 11.7. The Parties, exclusive of the requesting Party and the State, may
26 provide their position on whether an extension is warranted and if good
27 cause exists. This position must be provided prior to the conclusion of
28 the four-day review period to allow for consideration by the State.
29

30 11.8. A timely and good faith request by the Response Entities for an
31 extension shall temporarily suspend any initiation of administrative or
32 judicial remedies or application for judicial enforcement of the
33 affected timetable and deadline or schedule until a decision is reached
34 on whether the requested extension will be approved.

35 (a) Should the requested extension be denied, the initiation of
36 administrative or judicial remedies or application for judicial
37 enforcement, as provided in Section 15 of this Agreement may be
38 sought starting from the date of the original timetable, deadline,
39 or schedule.

40 (b) Following the grant of an extension, the initiation of
administrative or judicial remedies or application for judicial

1 enforcement may be sought only to compel compliance with the
2 timetable and deadline or schedule as most recently extended.

3 (c) If dispute resolution is invoked, suspension of any initiation
4 of administrative or judicial remedies or application for judicial
5 enforcement of the affected timetable and deadline or schedule
6 shall occur immediately and remain until a decision is reached by
7 the Dispute Resolution Committee (DRC). The DRC shall resolve the
8 appropriate date in the timetable, deadline, or schedule for
9 establishing the present project status, citation of administrative
10 or judicial remedies or judicial enforcement.
11

12 11.9. Where it is not possible to submit a written request of extension
13 seven (7) days prior to a compliance date, Response Entities may request
14 an emergency extension for good cause as provided in subsection 11.2.(a)
15 through 11.2.(j), of not more than seven (7) days, at any time prior to
16 the compliance date. The request will be made by facsimile containing
17 the information listed in subsections 11.1.(a) through 11.1.(d).
18

19 11.10. Within one (1) business day of receipt of a request for an
20 emergency extension, the State shall advise the requesting Party via
21 facsimile of the State's position on the request. Any failure by the
22 State to respond within the one (1) business day period shall be deemed
23 to constitute concurrence with the request for extension. If the State
24 does not concur with the requested extension, it shall include in its
25 statement of nonconcurrence an explanation of the basis for its
26 position.
27

28 12. FORCE MAJEURE 29

30 12.1. A Force Majeure shall mean any event arising from causes beyond
31 the control of a Party that causes a delay in or prevents the
32 performance of any obligation under this Agreement, including, but not
33 limited to:

34 (a) acts of God;

35 (b) fire;

36 (c) war, or national emergency declared by the President or
37 Congress of the United States and affecting the National Guard
38 Bureau or USACE;

39 (d) insurrection;

40 (e) civil disturbance;

41 (f) explosion;

- 1 (g) unanticipated breakage or accident to machinery, equipment or
2 lines of pipe despite reasonably diligent maintenance;
3 (h) adverse weather conditions that could not be reasonably
4 anticipated;
5 (i) unusual delay in transportation;
6 (j) restraint by court order, applicable law, or order of public
7 authority;
8 (k) inability to obtain, at reasonable cost and after exercise of
9 reasonable diligence, any necessary authorizations, approvals,
10 permits, or licenses due to action or inaction of any governmental
11 agency or authority other than the Response Entities;
12 (l) delays caused by compliance with applicable statutes or
13 regulations governing contracting, funding, procurement or
14 acquisition procedures, despite the exercise of reasonable
15 diligence;
16 (m) insufficient availability of appropriated funds or personnel
17 reduction relating therefrom, pursuant to Section 17 (Funding); and
18 (n) failure of a PRP to fund activities which directly impacts the
19 Response Entities tasks, obligations, or responsibilities.
20

21 12.2. In order for Force Majeure based on insufficient funding to apply
2 to:

- 23 (a) the National Guard Bureau and/or the USACE, the National Guard
24 Bureau and/or the USACE shall have made the timely request for such
25 funds as would be necessary to meet their tasks, obligations, and
26 responsibilities under this Agreement. These entities individually
27 agree to seek sufficient funding through the applicable budgetary
28 process to fulfill their responsibilities under this Agreement, as
29 specified in Appendix A. The DERA budgetary process as set forth in
30 Section 17 (Funding), subsections 17.1 to 17.4 shall be the funding
31 method used pursuant to this Agreement.
32 (b) the City of Fresno, Department of Airports shall have made
33 timely request for such funds as would be necessary to meet their
34 tasks, obligations, responsibilities under this Agreement. The
35 Department of Airports agrees to seek sufficient funding through
36 their budgetary process to fulfill their responsibilities under
37 this Agreement, as specified in Appendix A and subsections 17.5 to
38 17.6 of Section 17 (Funding). The City of Fresno shall have the
39 burden of proof to establish that the insufficient funding is
40 outside of the control of the City of Fresno.

1 12.3. A Force Majeure shall also include any strike or other labor
2 dispute, whether or not within the control of the Parties affected
3 thereby.

4
5 12.4. Force Majeure can be based on insufficient funding to include
6 unreasonable cost increases or unexpected expenses for Response Actions.
7 The Response Entities shall request funds, inaccordance with Fiscal
8 Funding requirements, for the increased costs whose cause could not
9 reasonable have been anticipated at the time the original cost estimate
10 was prepared. Upon request by the State, the Response Entities shall
11 provide a complete explanation of all efforts undertaken to avoid Force
12 Majeure. Should a Force Majeure occur, based on the insufficient
13 funding of any one of the Response Entities or a PRP, the other Response
14 Entities will maintain their agreed-upon tasks, obligations, and
15 responsibilities as set forth in Appendix A, to the maximum extent
16 possible.

17
18 12.5. In the event of a Force Majeure, the Parties will meet to
19 identify activities and schedules that are impacted by the Force Majeure
20 and to identify methods to mitigate the impact of the Force Majeure.

21 22 13. EMERGENCIES AND REMOVALS

23
24 13.1. If any Party discovers or becomes aware of an emergency or other
25 threatening situation from any discovered release of hazardous
26 substances: (1) that exist at the Site; (2) which have migrated onto the
27 Site; or (3) that have migrated from the Site, which may present an
28 endangerment to public health and safety and the environment, shall
29 immediately orally or via facsimile notify all other Parties and will
30 follow-up with written notification within seven (7) days. If the
31 emergency arises from activities conducted pursuant to this Agreement,
32 the Response Entities shall then take immediate action to notify the
33 appropriate State and local agencies and affected members of the public.

34
35 13.2. In the event any Party determines that activities conducted
36 pursuant to this Agreement will cause or otherwise be threatened by a
37 situation described in subsection 13.1, that Party may propose the
38 termination of such activities. If all the Parties agree, the
39 activities shall be stopped for such period of time as required to abate
40 the danger. In the absence of such agreement, the activities shall
41 continue, and the matter shall be immediately referred to the DTSC,

1 Region 1, Site Mitigation Branch Chief for a work stoppage determination
2 in accordance with Section 14.12.

4 13.3. Removal Actions:

5 (a) The provisions of this Section shall apply to all removal
6 actions as defined in CERCLA section 101(23), 42 U.S.C. section
7 9601(23), the NCP, and California Health and Safety Code section
8 25323, including all modifications to, or extensions of, the
9 ongoing removal actions, and all new removal actions proposed or
10 commenced following the effective date of this Agreement.

11 (b) Any removal actions conducted at the Site shall be subject to
12 applicable law and conducted in a manner consistent with CERCLA,
13 the NCP, this Agreement, E.O. 12580, and DERP.

14 (c) Except to the extent that CERCLA requires the application of
15 state laws, nothing in the Agreement shall alter the National Guard
16 Bureau's and the USACE's authority with respect to removal actions
17 conducted pursuant to CERCLA, section 104 and DERP.

18 (d) The City of Fresno may rely on the authority set forth in its
19 charter and section 25355 of the California Health and Safety Code
20 to carry out removal actions in accordance with this Agreement.

21 (e) Nothing in this Agreement shall alter any authority the State
22 may have with respect to removal actions conducted at the Site.

23 (f) All reviews conducted by the State will be expedited so as not
24 to unduly jeopardize fiscal resources of the Response Entities for
25 funding the removal actions.

26 (g) If the State determines that there may be an imminent and/or
27 substantial endangerment to the public health and safety and the
28 environment because of an actual or threatened release of a
29 hazardous substance, waste, pollutant or contaminant at or from the
30 Site, the State may request that the Response Entities take such
31 response actions as may be necessary to abate such danger or threat
32 and to protect the public health and safety and the environment.
33 Such actions might include provision of alternative drinking water
34 supplies or other response actions listed in section 25323 of the
35 California Health and Safety Code and Division 7 of the California
36 Water Code, or such other relief as the public interest may
37 require. Any dispute arising out of this subsection may be subject
38 to the expedited dispute resolution as provided in subsection 14.16
39 of the Agreement.

40 13.4. Notice and Opportunity to Comment:

1 (a) The Response Entities shall provide the State with timely
2 notice and opportunity to review and comment upon any proposed
3 removal action for the Site, in accordance with applicable law.
4 For proposed removal actions that do not receive federal Response
5 Entity funding, the Proponent shall submit any proposed removal
6 action for the Site to the State for approval. The Response
7 Entities agree to provide the information described below pursuant
8 to such obligation.

9 (b) For emergency response actions, the Response Entity(ies) shall
10 provide the State with oral or facsimile notice. Such oral or
11 facsimile notification shall, except in the case of extreme
12 emergencies, include, to the extent reasonably possible, adequate
13 information concerning the Site background, threat to the public
14 health and safety and the environment (including the need for
15 response), proposed actions and costs (including a comparison of
16 possible alternatives, means of transportation of any hazardous
17 substances off-site, and proposed manner of disposal), expected
18 change in the situation should no action be taken or should action
19 be delayed (including associated environmental impacts), any
20 important policy issues, and the Response Entities On-Scene
21 Coordinator recommendations. Within sixty (60) days of completion
22 of the emergency action, the Response Entities will furnish the
23 State with an Action Memorandum addressing the information provided
24 in the oral notification, and any other information required
25 pursuant to applicable law for such actions.

26 (c) For other removal actions, the Response Entities will provide
27 the State with a written Removal Work Plan which sets forth all
28 information required by applicable law and required to be provided
29 in accordance with subsection 13.4.(b). Removal Work Plans shall
30 be prepared and reviewed in accordance with this section and shall
31 not be subject to the general requirements for primary and
32 secondary documents contained in Section 9 (Review and Approval).
33 The Removal Work Plan shall be submitted to the State for review
34 and comment at least sixty (60) days before the response action is
35 to begin. The State shall have two weeks from the date of receipt
36 to review the Removal Work Plan and transmit any comments to the
37 Response Entities. Not less than ten (10) days before the response
38 action is scheduled to begin, the Response Entities shall provide
39 responses to the State's comments. This notice shall be subject to
40 expedited dispute resolution in accordance with subsection 14.16 of
41 the Agreement. The removal action shall not be commenced during

1 the pendency of the dispute resolution process, except as otherwise
2 allowed in accordance with subsection 13.2, above.

3 (d) All activities related to ongoing removal actions shall be
4 reported by the Response Entities in the progress reports as
5 described in Section 19 (Project Managers).
6

7 14. DISPUTE RESOLUTION 8

9 14.1. The procedures set forth in subsections 14.2 to 14.14 shall apply
10 to the federal, state, and local government agencies that are party to
11 this Agreement; whereas the procedure set forth in subsections 14.8 to
12 14.18 shall apply to other parties (non-governmental) to this Agreement.
13 Except as specifically set forth elsewhere in this Agreement, if a
14 dispute arises under this Agreement, the procedures of this Section
15 shall apply. Any Party may invoke the following dispute resolution
16 procedure. All Parties to this Agreement shall make reasonable efforts
17 to informally resolve disputes at the Project Manager or immediate
18 supervisor level. If resolution cannot be achieved informally, the
19 procedures of this Section shall be implemented to resolve a dispute.
20

21 14.2. Within thirty (30) days after:

2 (a) the issuance of a draft final primary document pursuant to
23 Section 9 (Review and Approval); or

24 (b) any action which leads to or generates a dispute,
25 the disputing Party shall submit to the Dispute Resolution Committee
26 (DRC) a written statement of dispute setting forth the nature of the
27 dispute, the work affected by the dispute, the disputing Party's
28 position with respect to the dispute and the technical, legal or factual
29 information the disputing Party is relying upon to support its position.
30

31 14.3. Prior to any Party's issuance of a written statement of a
32 dispute, the disputing Party shall engage the other Parties in informal
33 dispute resolution among the Project Managers and/or their immediate
34 supervisors. During this informal dispute resolution period the Parties
35 shall meet as many times as are necessary to discuss and attempt
36 resolution of the dispute.
37

38 14.4. The DRC will serve as a forum for resolution of disputes for
39 which agreement has not been reached through informal dispute
40 resolution. The Parties shall each designate one individual and an
alternate to serve on the DRC. The individuals designated to serve on

1 the DRC shall be delegated the authority to participate on the DRC for
2 the purposes of dispute resolution under this Agreement.

3 (a) The National Guard Bureau's designated member is the Chief
4 Environmental Division NGB/DEV.

5 (b) The USACE's designated member is the Deputy Commander, Omaha
6 District.

7 (c) The City of Fresno member is the Deputy City Manager-
8 Environmental.

9 (d) The DTSC representative is the Chief of the Site Mitigation
10 Branch, Region 1.

11 (e) The RWQCB representative is Supervisor of the Land Discharge
12 Section, Central Valley Region, Fresno.

13 Written notice of any delegation of authority from a Party's designated
14 representative on the DRC shall be provided to all other Parties
15 pursuant to the procedures of Section 21 (Notification).
16

17 14.5. Following elevation of a dispute to the DRC, the DRC shall have
18 twenty-one (21) days to unanimously resolve the dispute and issue a
19 written decision. If the DRC is unable to unanimously resolve the
20 dispute within this twenty-one (21) day period, the written statement of
21 dispute shall be forwarded, within seven (7) days after the close of the
22 twenty-one (21) day resolution period, to the Senior Executive Committee
23 (SEC) for resolution.
24

25 14.6. The SEC will serve as the forum for resolution of disputes for
26 which agreement has not been reached by the DRC.

27 (a) The National Guard Bureau's representative on the SEC is
28 Deputy Assistant Secretary for the Environment, Safety and
29 Occupational Health of the Air Force or the Deputy Assistant
30 Secretary for the Environment of the Army, as necessary for
31 jurisdictional purposes.

32 (b) The USACE's representative on the SEC is the Division
33 Engineer, Missouri River Division or successor division.

34 (c) The City of Fresno's representative on the SEC is Chief Deputy
35 City Manager.

36 (d) The DTSC representative on the SEC is the Deputy Director of
37 Site Mitigation.

38 (e) The RWQCB representative on the SEC is Executive Officer,
39 Central Valley Region.

1 Written notice of any delegation of authority from a Party's designated
2 representative on the SEC shall be provided to all other Parties
3 pursuant to the procedures of Section 21 (Notification).
4

5 14.7. The SEC shall confer, meet, and exert their best efforts to
6 resolve unanimously the dispute within twenty-one (21) days after
7 receipt of the written statement of dispute, except that a majority SEC
8 decision will prevail with regards to DTSC's decisions not to pursue
9 additional parties, pursuant to subsections 3.3 to 3.7 of this
10 Agreement.
11

12 14.8. In the event the dispute cannot be resolved in accordance with
13 Section 14 of the Agreement, the following will apply. With respect to
14 disputes between federal Response Entities and the State, each party
15 reserves its rights to take any action available to it under law or
16 equity. With respect to non-federal Response Entities and the State,
17 the State will make the final administrative decision concerning the
18 dispute. The State shall consistently apply upon all Response Entities
19 requirements for the selection of the final remedy.
20

1 14.9. The pendency of any dispute under this Section shall not affect
22 any Party's responsibility for timely performance of the work required
23 by this Agreement, except that the time period for completion of work
24 affected by such dispute shall be extended for a period of time usually
25 not to exceed the actual time taken to resolve any good faith dispute or
26 the determined extension period by the committee, in accordance with the
27 procedures specified herein. All elements of the work required by this
28 Agreement which are not directly or indirectly affected by the dispute
29 shall continue and be completed in accordance with the applicable
30 timetable and deadline or schedule.
31

32 14.10. Upon submission of an issue for dispute resolution pursuant to
33 this Section, any Party may request that all work related to the issue
34 under dispute be stopped pending the final outcome of the dispute
35 resolution. Except as may otherwise be provided in subsection 13.2,
36 governing emergency work stoppages, the Party seeking a work stoppage
37 shall, to the extent possible under the circumstances, consult with the
38 other Parties prior to initiating the work stoppage request. The
39 request shall be reviewed by the State. The work shall be immediately
40 stopped if the State thereafter determines, in writing, such work is
inadequate or defective and such inadequacy or defect is likely to yield

1 an adverse effect on human health or the environment, or is likely to
2 have a substantial adverse effect on the remedy selection or
3 implementation process. Upon such written determination, the original
4 dispute, as well as the work stoppage determination, shall be submitted
5 together for Expedited Dispute Resolution, pursuant to subsection 14.14.
6
7 14.11. Within sixty (60) days of resolution of a dispute pursuant to
8 the procedures specified in this Section, the Response Entities shall
9 incorporate the resolution and final determination into the appropriate
10 plan, schedule or procedures and proceed to implement this Agreement
11 according to the amended plan, schedule or procedures.
12
13 14.12. Except as set forth in subsection 14.16 of this Agreement,
14 resolution of a dispute pursuant to this Section of the Agreement
15 constitutes a final administrative resolution of any dispute arising
16 under this Agreement.
17
18 14.13. For the purpose of all dispute resolution procedures set forth
19 in this Agreement and other decisions of the Parties that may be taken
20 to dispute resolution, the Parties agree, as follows. Although DTSC and
21 RWQCB may participate in the discussions throughout the dispute
22 resolution process, wherever in this Section unanimity of decision is
23 required for resolving disputes, the State, as represented by DTSC and
24 RWQCB, shall have one vote. It shall be the responsibility of DTSC and
25 RWQCB to determine who shall cast the vote on the behalf of the State.
26
27 14.14. Expedited Dispute Resolution:
28 (a) The following procedure shall apply whenever the provisions of
29 this Agreement call for expedited dispute resolution.
30 (b) The dispute shall be submitted directly to the DRC, which
31 shall have ten (10) days to unanimously resolve the dispute. The
32 DRC shall, within four (4) days after the end of the ten-day
33 period, forward an unresolved dispute to the SEC.
34 (c) The SEC shall have seven (7) days to unanimously resolve the
35 dispute.
36 (d) In the event a dispute cannot be resolved in accordance with
37 Section 14, each Party reserves its rights to take any action
38 available to it under applicable laws.
39
40 14.15. For disputes relating to solely non-government Response
41 Entity(ies) issues, the following procedures shall be implemented:

1 (a) Within thirty (30) days after:

2 (1) the issuance of a draft final primary document pursuant
3 to Section 9 (Review and Approval); or

4 (2) any action which leads to or generates a dispute,
5 the disputing Party shall submit to the State's DRC representatives
6 specified in subsection 14.4 a written statement of the dispute setting
7 forth the nature of the dispute, the work affected by the dispute, the
8 disputing Party's position with respect to the dispute, and the
9 technical, legal or factual information the disputing Party is relying
10 upon to support its position.

11
12 14.16. Prior to any Party's issuance of a written statement of a
13 dispute, the disputing Party shall engage the State and the other
14 Parties, as appropriate, in an informal dispute resolution among the
15 Project Managers and/or their immediate supervisors. During this
16 informal dispute resolution period, the Parties involved shall, in good
17 faith, meet as many times as necessary to discuss and attempt a
18 resolution of the dispute.

19
20 14.17. If the dispute cannot be resolved as specified in subsection
21 14.16, above, the dispute may be elevated to the State's DRC
22 representatives. The State's DRC representative and the Disputing Party
23 shall have twenty-one (21) days to unanimously resolve the dispute and
24 issue a written decision. If the State's DRC representatives and the
25 Disputing Party are unable to unanimously resolve the dispute within
26 this twenty-one (21) day period, the written statement of dispute shall
27 be forwarded, within seven (7) days after the close of the twenty-one
28 (21) day resolution period, to the State's SEC representatives,
29 specified in Section 14.6.

30
31 14.18. If unanimous resolution of the dispute is not reached by the
32 State's SEC representatives and the Disputing Party within twenty-one
33 (21) days, the State's SEC representatives shall, within twenty-one (21)
34 days, provide the other Parties with a written final decision setting
35 forth resolution of the dispute.

36
37 15. ENFORCEABILITY

38
39 15.1. The Parties agree to exhaust their rights under Section 14
40 (Dispute Resolution) prior to seeking any administrative or judicial
41 enforcement or review.

1 15.2. The Parties agree that all Parties shall have the right to
2 enforce the terms of this Agreement in accordance with applicable laws.
3

4 16. LEGAL REMEDIES 5

6 16.1. In the event that the Response Entities:

7 (a) fail to submit a primary document listed in Section 9 (Review
8 and Approval) to the State pursuant to the appropriate timetable or
9 deadline in accordance with the requirements of this Agreement or
10 any extension thereof, or

11 (b) fail to comply with a material term or condition of this
12 Agreement which relates to the final remedial action, the State
13 reserves its right to seek all legal remedies available to it
14 against the Response Entities either administratively or
15 judicially. The Response Entities reserve their right to contest
16 any such legal remedies imposed administratively or judicially.
17

18 16.2. Upon determining that the Response Entities have failed in a
19 manner set forth in subsection 16.1, above, the State shall so notify
20 the Response Entities in writing. If the failure in question is not
21 already subject to dispute resolution at the time such notice is
22 received, the Response Entities shall have fifteen (15) days after
23 receipt of the notice to invoke dispute resolution on the question of
24 whether the failure did in fact occur. The Response Entities shall not
25 be liable for the legal remedy sought by the State if the failure is
26 determined, through the dispute resolution process, not to have
27 occurred. The State agrees not to seek legal remedy or review of
28 related issues either judicially or administratively until the
29 conclusion of the dispute resolution process relating to the legal
30 remedy issue.
31

32 16.3. This Section shall not affect the ability of the Response
33 Entities to obtain an extension of a timetable, deadline or schedule
34 pursuant to Section 11 (Extensions).
35

36 16.4. Nothing in this Agreement shall be construed to render any
37 member, officer, employee, or agent of the Response Entities personally
38 liable for the payment of any legal remedy assessed pursuant to this
39 Section.
40

41 17. FUNDING

1 17.1. It is the expectation of the Parties to this Agreement that all
2 obligations of the National Guard Bureau and the USACE arising under
3 this Agreement will be fully funded. The National Guard Bureau and the
4 USACE agree to seek sufficient funding through the DOD/DERA budgetary
5 process to fulfill their obligations under this Agreement.
6

7 17.2. Any requirement for the payment or obligation of funds, including
8 legal remedies under Section 16 or State oversight costs under Section
9 33 of this Agreement, by the National Guard Bureau and the USACE
10 established by the terms of this Agreement shall be subject to the
11 availability of appropriated funds, and no provision herein shall be
12 interpreted to require obligation or payment of funds in violation of
13 the Anti-Deficiency Act, 31 U.S.C. section 1341. In cases where payment
14 or obligation of funds would constitute a violation of the Anti-
15 Deficiency Act, the dates established requiring the payment or
16 obligation of such funds shall be appropriately adjusted.
17

18 17.3. Funds authorized and appropriated annually by Congress under the
19 "Environmental Restoration, Defense" appropriation in the Department of
20 Defense Appropriation Act and allocated by the Deputy Assistant
21 Secretary of Defense for Environment to the National Guard Bureau and/or
22 USACE will be the source of funds for activities required by this
23 Agreement consistent with section 211 of CERCLA, 10 U.S.C. Chapter 160.
24 The National Guard Bureau and/or USACE in good faith, will use the
25 Defense Priority Model (DPM) and associated procedures to establish
26 funding priorities which are protective of human health and the
27 environment.
28

29 17.4. The National Guard Bureau and the USACE shall include, in their
30 DERA submission to the Department of Defense annual report to Congress,
31 the specific cost estimates and budgetary proposals associated with the
32 implementation of this Agreement.
33

34 17.5. It is the expectation of the Parties to this Agreement that all
35 obligations of the City of Fresno or other non-Federal entities arising
36 under this Agreement will be fully funded. These entities individually
37 agree to seek sufficient funding through the applicable budgetary
38 process to fulfill their obligation under this Agreement, as specified
39 in Appendix A. Any requirement for the payment or obligation of funds
40 established by the terms of this Agreement shall be subject to the
41 availability of appropriated funds, and no provision herein shall be

1 interpreted to require obligation or payment of funds in violation of
2 appropriate laws.

3

4 17.6. If funds are not available to fulfill any Response Entities'
5 obligations under this Agreement, under circumstances not amounting to
6 Force Majeure, the State, subject to dispute resolution, reserves the
7 right to enforce this Agreement through any appropriate means, to
8 initiate an action against any other person, or to take any response
9 action, which would be appropriate absent this Agreement.

10

11 18. EXEMPTIONS

12

13 18.1. The obligations of the National Guard Bureau and/or USACE to
14 comply with the provisions of this Agreement may be relieved by:

15 (a) A Presidential order of exemption issued pursuant to the
16 provisions of CERCLA section 120(j)(1), 42 U.S.C. section
17 9620(j)(1), or RCRA section 6001, 42 U.S.C. section 6961.

18

19 18.2. The obligation of the Response Entities to comply with the
20 provisions of this Agreement may be relieved by:

21 (a) The order of an appropriate court; or

22 (b) The dispute resolution process in Section 14 of this
23 Agreement.

24

25 18.3. The State reserves any statutory right it may have to challenge
26 any order relieving the Response Entities of their obligation to comply
27 with this Agreement.

28

29 19. PROJECT MANAGERS

30

31 19.1. Within ten (10) days after the date of execution of this
32 Agreement, the Parties shall each designate a Project Manager and an
33 alternate (each hereinafter referred to as Project Manager), for the
34 purpose of overseeing the implementation of this Agreement. The Project
35 Managers shall be responsible on a daily basis for assuring proper
36 implementation of the PA/SI, RI/FS and the RD/RA in accordance with the
37 terms of the Agreement. In addition to the formal notice provisions set
38 forth in Section 21 (Notification), communications among the Parties on
39 all documents, including reports, comments, and other correspondence
40 concerning the activities performed pursuant to this Agreement, shall be
41 directed through the Project Managers.

1 19.2. The Parties may change their respective Project Managers. The
2 other Parties shall be notified in writing within five (5) days of the
3 change.

4
5 19.3. The Project Managers shall meet to discuss progress as described
6 in subsection 9.7. Although each Party has ultimate responsibility for
7 meeting its respective deadlines or schedule, the Project Managers shall
8 assist in this effort by consolidating the review of primary and
9 secondary documents whenever possible, and by scheduling progress
10 meetings to review reports, evaluate the performance of environmental
11 monitoring at the Site, review PA/SI, RI/FS or RD/RA progress, discuss
12 target dates for elements of the PA/SI and/or RI/FS, resolve disputes,
13 and adjust deadlines or schedules.

14 (a) At least one week prior to each scheduled progress meeting,
15 the designated Response Entity Project Manager will provide to the
16 State and the Parties an agenda. The Response Entities Project
17 Manager(s) will brief the State on the status and a brief summary
18 of their work subject to this Agreement.

19 (b) The designated Response Entity Project Manager shall be
20 responsible for preparation of minutes of all meetings and shall
21 furnish copies on a timely basis to the State and other Parties.
2 Unless the Project Managers agree otherwise, the minutes of each
23 progress meeting, with the meeting agenda and all documents
24 discussed during the meeting (which were not previously provided)
25 as attachments, shall constitute a progress report.

26 (c) The designated Response Entity Project Manager will send to
27 all other Project Managers:

28 (1) within fourteen (14) days after the meeting all such
29 documents not previously provided and

30 (2) within twenty-one (21) days after the meeting, the
31 minutes and agenda.

32 The State and other Response Entities will have five (5) working
33 days to submit comments to the designated Response Entity Project
34 Manager. If no comments are received by the designated Response
35 Entity Project Manager, the minutes shall become final.

36 (d) In the event that a quarterly meeting is not held or excessive
37 time elapses between Project Manager meetings, the individual
38 Response Entity Project Managers will prepare a progress report on
39 their activities covered under this Agreement. Such quarterly
40 reports will be submitted to the State and other Parties, in a
timely manner, and shall include the information that would

1 normally be discussed in a progress meeting of the Project
2 Managers. Other meetings may be held more frequently than
3 specified in subsection 9.7 of this Agreement.
4

5 19.4. The authority of the State's Project Manager(s) (SPM) shall
6 include, but is not limited to:

7 (a) Taking samples and ensuring that sampling and other field work
8 is performed in accordance with the terms of any final work plan
9 and QAPP;

10 (b) Observing, and taking photographs and making such other
11 reports on the progress of the work as the SPM deem appropriate,
12 subject to the limitations set forth in Section 25 (Access to
13 Federal Facilities and Fresno Air Terminal) hereof;

14 (c) Reviewing records, files and documents relevant to the work
15 performed, subject to the limitations set forth in Section 23
16 (Release of Records), hereof;

17 (d) Determining the form and specific content of the Project
18 Manager meetings and of progress reports based on such meetings;
19 and

20 (e) Recommending and requesting minor field modifications to the
21 work to be performed pursuant to a final work plan, or in
22 techniques, procedures, or design utilized in carrying out such
23 work plan.

24 (f) Reviewing and recommending to the Response Entities all
25 requirements, including ARARs and removal/remedial action laws and
26 regulations, pertinent to the Site.
27

28 19.5. Any minor field modification proposed by the State pursuant to
29 this Section must be approved orally by the Response Entity(ies) subject
30 of the request, to be effective. The Response Entity(ies) Project
31 Manager will make a contemporaneous record of such modification and
32 approval in a written log, and a copy of the log entry will be provided
33 as part of the next progress report. Even after approval of the
34 proposed modification, no Project Manager will require implementation by
35 a government contractor without approval of the appropriate Government
36 Contracting Officer. Minor modifications by the Response Entities
37 Project Manager may be made without approval of the State.
38

39 19.6. The Project Manager for the Response Entities shall be
40 responsible for the field activities at the Site. On site coordination
41 may be by the Project Manager's Contractor for activities related to the

1 Site investigation. This individual will be available through the
2 Response Entities' Project Manager for any consultation or explanation
3 of the specific activities on the Site. For all times that such work is
4 being performed, the Response Entities Project Manager(s) or designated
5 individual shall inform the command post at Fresno Air National Guard
6 Base, Army National Guard Shields Avenue Facility and/or FAT of the name
7 and telephone number of the designated employee responsible for
8 supervising the work.

9
10 19.7. The Response Entities' Project Manager(s) shall have an
11 established quality assurance program and shall maintain quality control
12 regarding all field work and sample collection performed pursuant to
13 this Agreement. The Response Entities agree to designate an individual
14 to insure that quality assurance and the associated field work is
15 performed in accordance with approved work plans, sampling plans and
16 QAPPs. The Response Entities shall provide to the State, in the work
17 plans, the name(s) of the individual responsible for the maintenance of
18 the inspection log of quality assurance field activities and provide a
19 copy to the Parties upon request.

20
21 19.8. All laboratories performing analysis on behalf of the Response
22 Entities pursuant to this Agreement shall be California State Certified
23 Laboratories for hazardous waste. USACE may require additional
24 certifying requirements for activities on the Site.

25
26 19.9. The Project Managers shall be reasonably available to consult on
27 work performed pursuant to this Agreement and shall make themselves
28 available to each other for the pendency of this Agreement. The absence
29 of any of the Parties' Project Managers from the facility shall not be
30 cause for work stoppage of activities taken under this Agreement.

31 32 20. PERMITS

33
34 20.1. To the extent consistent with CERCLA and state law, the Parties
35 agree that sections 121(d) and 121(e)(1) of CERCLA, 42 U.S.C. sections
36 9621(d) and 9621(e)(1), and the NCP, portions of the response actions
37 called for by this Agreement and conducted entirely on-site may be
38 exempted from the procedural requirement to obtain a federal, state, or
39 local permit but must satisfy all promulgated (as defined in NCP section
40 300.400(g)(4)) applicable or relevant and appropriate federal and state

1 substantive standards, requirements, criteria, or limitations which
2 would have been included in any such permit.

3

4 20.2. This section is not intended to relieve the Response Entities
5 from any applicable regulatory requirements, including obtaining a
6 permit, whenever it proposes a response action involving either the
7 movement of hazardous substances, pollutants, or contaminants off-site,
8 or the conduct of a response action off-site.

9

10 20.3. The Response Entities shall notify the State in writing of any
11 permit required for off-site activities as soon as it becomes aware of
12 the requirement. The Response Entities agree to obtain any permits
13 necessary for the performance of any work under this Agreement. Upon
14 request, the Response Entities shall provide the State copies of all
15 such permit applications and other documents related to the permit
16 process. Copies of permits obtained in implementing this Agreement
17 shall be appended to the appropriate submittal or progress report. Upon
18 request of the Response Entities Project Manager(s), the Project
19 Manager(s) of the State will assist the Response Entities to the extent
20 feasible in obtaining any required permit.

21

22 21. NOTIFICATION

23

24 21.1. All Parties shall transmit primary and secondary documents, and
25 comments thereon, and all notices required herein by next day mail, hand
26 delivery, facsimile (followed with an original by first-class mail) or
27 by certified mail, if transmitted sufficiently ahead of the applicable
28 deadline. Notifications shall be deemed effective upon receipt.

29

30 21.2. Notice to the individual Parties pursuant to this Agreement shall
31 be sent to the addresses, telephone and facsimile numbers specified by
32 the Parties. Initially these shall be as provided in Appendix D.

33

34 21.3. All routine correspondence may be sent via first class mail to
35 the addressees in Appendix D.

36

37 22. DATA AND DOCUMENT AVAILABILITY

38

39 22.1. Each Party shall make all validated sampling results, test
40 results or other data or documents generated through the implementation
41 of this Agreement available to the other Parties. All validated data

1 shall be supplied within ninety (90) days after completion of a sampling
2 event. The procedure of Section 11 (Extensions) shall apply to the
3 ninety-day period referred to herein.

4
5 22.2. The Sampling Party's Project Manager shall notify the other
6 Parties' Project Managers not less than ten (10) days in advance of any
7 sample collection. If it is not possible to provide ten (10) days prior
8 notification, the sampling Party's Project Manager shall notify the
9 other Project Managers as soon as possible after becoming aware that
10 samples will be collected. Each Party shall allow other Parties or
11 their authorized representatives to collect, according to the approved
12 workplan procedures, to the extent practicable, split or duplicate
13 samples. Each Party receiving split or duplicate samples shall on
14 request provide the Sampling Party with its chain of custody documents
15 relating to such samples.

16 17 23. RELEASE OF RECORDS

18
19 23.1. The Parties may reasonably request of one another access to or a
20 copy of any record or document relating to this Agreement or, upon the
21 requesting party's demonstration of the need to know, any other
22 remediation activities conducted at the site. If the Party that is the
23 subject of the request (the originating Party) has the record or
24 document, that Party shall provide access to or a copy of the record or
25 document; provided, however, that no access to or copies of records or
26 documents need be provided if they are subject to claims of
27 confidentiality because of attorney-client privilege, attorney work
28 product, other applicable legal privileges, deliberative process,
29 enforcement confidentiality, the Federal Privacy Act, properly
30 classified for national security under law or executive order, or any
31 exemption by the Freedom of Information Act or California Public Records
32 Act.

33
34 23.2. A determination not to release a document shall not be subject to
35 Section 14 (Dispute Resolution). Any Party objecting to another Party's
36 determination may pursue the objection through the determining Party's
37 appeal procedures or other legal action.

38 39 24. PRESERVATION OF RECORDS

1 24.1. Despite any document retention policy to the contrary, the
2 Parties shall preserve, during the pendency of this Agreement and for a
3 minimum of ten (10) years after its termination, all records and
4 documents contained in the Administrative Record and any additional
5 records and documents retained in the ordinary course of business which
6 relate to the actions carried out pursuant to this Agreement. After
7 this ten (10) year period, each Party shall notify the other Parties at
8 least sixty (60) days prior to destruction of any such documents. Upon
9 request by any Party, the requested Party shall make available such
10 records or copies of any such records, unless withholding is authorized
11 and determined appropriate by law or subsection 23.1, above.
12

13 25. ACCESS TO FEDERAL FACILITIES AND FRESNO AIR TERMINAL 14

15 25.1. Without limitations on any authority conferred on the State by
16 statute or regulation, the State or its authorized representatives,
17 shall be allowed to enter Fresno Air Terminal at reasonable times for
18 purposes consistent with the provisions of the Agreement. Such access
19 shall include, but not be limited to, reviewing the progress of the City
20 of Fresno in carrying out the terms of this Agreement; ascertaining that
21 the work performed pursuant to this Agreement is in accordance with
22 approved work plans, sampling plans and QAPPs; and conducting such tests
23 as the State, represented by the Project Manager(s), deems necessary.
24

25 25.2. The City of Fresno shall honor all reasonable requests for access
26 by the State, conditioned upon presentation of proper credentials. The
27 City of Fresno Project Manager or designee(s) will provide briefing
28 information, coordinate access and escort to restricted or controlled-
29 access areas, arrange for air terminal passes and coordinate any other
30 access requests which arise.
31

32 25.3. The State shall provide reasonable notice (which shall, if
33 practical, be twenty-four (24) hours advance notice) to the City of
34 Fresno Project Manager to request any necessary escorts.
35

36 25.4. If the State requests access in order to observe a sampling event
37 or other work being conducted by the City of Fresno pursuant to this
38 Agreement, and access is denied or limited, the City of Fresno agrees to
39 reschedule or postpone such sampling or work if the State so requests,
40 until such mutually agreeable time when the requested access is allowed.
41 The City of Fresno shall not restrict the access rights of the State to

1 any greater extent than the City of Fresno restricts the access rights
2 of its contractors performing work pursuant to this Agreement.

3
4 25.5. All Parties with access to Fresno Air Terminal pursuant to this
5 Section shall comply with all applicable health and safety plans.

6
7 25.6. To the extent the activities pursuant to this Agreement must be
8 carried out on other than City of Fresno property, the Party conducting
9 the work shall use its best efforts to obtain access agreements from the
10 owners which shall provide reasonable access for the City of Fresno and
11 the State and its representatives. Said Party may request the
12 assistance of the State in obtaining such access, and upon such request,
13 the State will use its best efforts to obtain the required access. In
14 the event that said Party is unable to obtain such access agreements,
15 the Party shall promptly notify the State.

16
17 25.7. Notwithstanding any other provisions of this Agreement, the City
18 of Fresno, as the current owner of all of the Fresno Air Terminal, is
19 required to comply with strict safety, security and other federal and
20 state laws, rules and regulations, regarding the operation of the
21 aviation facility. Therefore, all Parties agree that any testing or
22 field activity of any sort pertaining to this agreement and involving a
23 need to access the Fresno Air Terminal shall be the subject of
24 reasonable prior notice to the City of Fresno to accommodate the
25 request. Furthermore, any remediation or other response activities
26 conducted by any Party on FAT shall comply with all applicable federal,
27 state, and local laws and regulations, regarding aviation facilities.
28 Should the National Guard Bureau or USACE wish to conduct activities,
29 under this Agreement on FAT, the National Guard Bureau or USACE shall
30 execute a right of entry agreement prior to any such activity. All
31 other Response Entities shall make written access requests to the City
32 of Fresno. The City of Fresno retains the right to require right of
33 entry agreements and other documentation, as necessary, from such
34 Response Entities, prior to granting access.

35
36 25.8. Without limitations on any authority conferred on the State by
37 statute or regulation, the State or its authorized representatives,
38 shall be allowed to enter Fresno Air National Guard Base and the Army
39 National Guard Shields Avenue Facility at reasonable times for purposes
40 consistent with the provisions of the Agreement, subject to any
statutory and regulatory requirements necessary to protect national

1 security or mission essential activities. Such access shall include,
2 but not be limited to, reviewing the progress of the National Guard
3 Bureau in carrying out the terms of this Agreement; ascertaining that
4 the work performed pursuant to this Agreement is in accordance with
5 approved work plans, sampling plans and QAPPs; and conducting such tests
6 as the State, represented by the Project Manager(s), deems necessary.
7

8 25.9. The National Guard Bureau shall honor all reasonable requests for
9 access by the State conditioned upon presentation of proper credentials.
10 The National Guard Bureau Project Manager(s) or designee(s) will provide
11 briefing information, coordinate access and escort to restricted or
12 controlled-access areas, arrange for base passes and coordinate any
13 other access requests which arise.
14

15 25.10. The State shall provide reasonable notice (which shall, if
16 practical, be twenty-four (24) hours advance notice) to the National
17 Guard Bureau Project Manager(s) to request any necessary escorts. The
18 State shall not use any camera, sound recording or other recording
19 device at Fresno Air National Guard Base and/or the Army National Guard
20 Shields Avenue Facility without the appropriate permission. The
21 National Guard Bureau shall not unreasonably withhold such permission.
22

23 25.11. State access granted in subsection 25.8, shall be subject to
24 those regulations necessary to protect national security or mission
25 essential activities. Such regulation shall not be applied so as to
26 unreasonably hinder the State from carrying out its responsibilities and
27 authority pursuant to this Agreement. In the event that access requested
28 by the State is denied by the National Guard Bureau, the National Guard
29 Bureau shall provide an explanation within 48 hours of the reason for
30 the denial, including reference to the applicable regulations, and, upon
31 request, a copy of such regulations. The National Guard Bureau shall
32 expeditiously make alternative arrangements for accommodating the
33 requested access. The Parties agree that this Agreement is subject to
34 CERCLA section 120(j) regarding the issuance of site specific
35 Presidential orders, as may be necessary to protect national security.
36

37 25.12. If the State requests access in order to observe a sampling
38 event or other work being conducted by the National Guard Bureau
39 pursuant to this Agreement, and access is denied or limited, the
40 National Guard Bureau agrees to reschedule or postpone such sampling or
41 work if the State so requests, until such mutually agreeable time when

1 the requested access is allowed. The National Guard Bureau shall not
2 restrict the access rights of the State to any greater extent than the
3 National Guard Bureau restricts the access rights of its contractors
4 performing work pursuant to this Agreement.

5

6 25.13. All Parties with access to Fresno Air National Guard Base and/or
7 Army National Guard Shields Avenue Facility pursuant to this Section
8 shall comply with all applicable health and safety plans.

9

10 25.14. To the extent the activities pursuant to this Agreement must be
11 carried out on other than National Guard Bureau property, the National
12 Guard Bureau shall use its best efforts to obtain access agreements from
13 the owners which shall provide reasonable access for the National Guard
14 Bureau and the State and their representatives. The National Guard
15 Bureau may request the assistance of the State in obtaining such access,
16 and upon such request, the State will use its best efforts to obtain the
17 required access. In the event that the National Guard Bureau is unable
18 to obtain such access agreements, the National Guard Bureau shall
19 promptly notify the State.

20

21 25.15. With respect to non-National Guard Bureau property, non-USACE
22 property, or non-City of Fresno property, on which monitoring wells,
23 pumping wells, or other response actions are to be located, the Party
24 conducting the work shall use its best efforts to ensure that any access
25 agreements shall provide for the continued right of entry for the Party
26 seeking the right of entry and the State for the performance of such
27 response activities.

28

29 25.16. Nothing in this Section shall be construed to limit the State's
30 full right of access as provided in California Health and Safety Code
31 section 25185 and Division 7 of the California Water Code, except as
32 that right may be limited by applicable national security regulations,
33 or state or federal law.

34

35 26. PUBLIC PARTICIPATION

36

37 26.1. The Parties agree that any proposed removal actions and remedial
38 action alternative(s) and plan(s) for remedial action at the Site
39 arising out of this Agreement shall comply with the administrative
40 record and public participation requirements of applicable law including
41 relevant community relations provisions in the NCP. The State agrees to

1 inform the Response Entities of all State requirements which it
2 determines to pertain to public participation.

3

4 26.2. The Response Entities shall develop and implement a Public
5 Participation Plan (PPP) or Community Relations Plan (CRP) addressing
6 the site remediation activities and elements of work undertaken by the
7 Response Entities, except where the NCP does not require a CRP for the
8 particular work to be performed.

9

10 26.3. The Response Entities shall establish and maintain an
11 administrative record at a place, at or near the Site, which is freely
12 accessible to the public, which shall provide the documentation
13 supporting the selection of each response action. The administrative
14 record shall be established and maintained in accordance with relevant
15 provisions of applicable law. A copy of each document placed in the
16 administrative record, not already provided, will be provided on a
17 quarterly basis by the Response Entities to the State. An index of
18 documents in the administrative record will accompany each update of the
19 administrative record.

20

21 26.4. Except in case of an emergency, any Party issuing a press release
22 or fact sheet with reference to any of the work required by this
23 Agreement shall advise the other Parties of such press release or fact
24 sheet and the contents thereof, at least two (2) business days prior to
25 issuance.

26

27 26.5. All public information of any sort involving activities covered
28 under this Agreement shall be provided to all Parties reasonably in
29 advance of the information being released to the Public.

30

31 27. FIVE YEAR REVIEW

32

33 27.1. Consistent with CERCLA section 121(c), a periodic review of final
34 response actions (e.g. operation, maintenance or monitoring of remedial
35 actions) for all OUs shall be conducted by the Response Entities once
36 every five (5) years commencing with the initiation of the final
37 response action for the first OU. Such five year reviews shall be
38 conducted to assure that the public health and safety and the
39 environment are being protected by the response actions, as long as
40 hazardous substances, pollutants or contaminants remain within an
41 operable unit.

1 27.2. Copies of all documents generated by the five-year review shall
2 be made available to all other Parties, in accordance with Section 21
3 (Notification) of this Agreement. If upon such review, the Party
4 conducting the five-year review or the State proposes additional work or
5 modification of work, such proposals shall be done in accordance with
6 CERCLA/SARA, the NCP, and applicable law.

8 28. TRANSFER OF REAL PROPERTY

10 28.1. The National Guard Bureau shall not transfer any real property
11 comprising the federal facilities except in compliance with section
12 120(h) of CERCLA, 42 U.S.C. section 9620(h); other authorizing federal
13 law; and section 25359.7 of the California Health and Safety Code.
14 Prior to any transfer of any portion of the land comprising the federal
15 facility which includes an area within which any release of hazardous
16 substance has come to be located, the National Guard Bureau shall give
17 written notice of that condition to the transferee of the land. At
18 least thirty (30) days prior to any conveyance subject to section 120(h)
19 of CERCLA, the National Guard Bureau shall notify all Parties of the
20 transfer of any real property subject to this Agreement and the
21 provisions made for any additional remedial actions, if required.

23 28.2. The City of Fresno shall not transfer any real property
24 comprising the Fresno Air Terminal except in compliance with section
25 25359.7 of the California Health and Safety Code. Specifically prior to
26 any sale, lease or rental of any portion of the land comprising the
27 Fresno Air Terminal which includes an area within which any release of
28 hazardous substance has come to be located, the City of Fresno shall
29 give written notice of that condition to the buyer, lessee, or renter of
30 the land. At least thirty (30) days prior to any conveyance subject to
31 section 25359.7 of the California Health and Safety Code, the City of
32 Fresno shall notify all Parties of the transfer of any real property
33 subject to this Agreement and the provisions made for any additional
34 remedial actions, if required.

36 28.3. Provisions of this section shall not alter the rights and
37 obligations under any existing leases between the signatories to this
38 Agreement.

40 29. AMENDMENT OR MODIFICATION OF AGREEMENT

1 29.1. This Agreement can be amended or modified solely upon written
2 consent of all Parties. Such amendments or modifications may be
3 proposed by any Party and shall be effective the third business day
4 following the day the last Party to sign the amendment or modification
5 sends its notification of signing to the other Parties. The Parties may
6 agree to a different effective date.

7

8 30. TERMINATION OF THE AGREEMENT

9

10 30.1. The provisions of this Agreement shall be deemed satisfied and
11 terminated as to all Parties upon receipt by the Response Entities of
12 written notice from the State, that the Response Entities have
13 demonstrated that all the terms of this Agreement have been completed.
14 The State shall not unreasonably withhold such notice upon request by
15 one of the Response Entities. If the State denies the request for
16 termination, the State shall provide a written statement of the basis
17 for its denial and describe the Response Entities actions which, in the
18 view of the State, would be a satisfactory basis for granting a notice
19 of completion. Such denial or failure to grant the request for
20 termination shall be subject to dispute resolution. If the State fails
21 to either grant or deny the request for termination, or fails to provide
22 a written statement for the basis for its denial, within one-hundred
23 eighty (180) days of receipt of the request, the request for termination
24 shall be deemed granted. Immediately upon any Party requesting State
25 notice, the said Party shall provide copies of such requests to all
26 other Parties.

27

28 30.2. A Party's tasks, obligations, and responsibilities, under this
29 agreement, shall terminate upon the listing of the site or a portion of
30 the site on the National Priorities List (NPL) and some official action
31 on the part of the U.S. Environmental Protection Agency that manifests
32 EPA's intent to be the lead agency. The EPA action may take the form,
33 but is not limited to, the issuance of a Cleanup Order, a USEPA
34 Interagency Agreement, or any action by the USEPA under 42 U.S.C.
35 sections 9604, 9606, 9620, or 9622.

36

37 30.3. Notwithstanding any language contrary to the above, should the
38 site or a portion of the site be listed on the NPL, whenever any action
39 by the EPA is in conflict with any State action, the Parties reserve
40 their rights pursuant to Section 31.2.

41

1 31. COVENANT NOT TO SUE AND RESERVATION OF RIGHTS

2

3 31.1. In consideration for the Response Entities' compliance with this
4 Agreement, and based on the information known to the Parties or
5 reasonably available on the effective date of this Agreement, the
6 Parties agree that full compliance with this Agreement shall stand in
7 lieu of any administrative, legal, and equitable remedies against the
8 Response Entities available to the State regarding the releases or
9 threatened releases of hazardous substances including hazardous wastes,
10 waste, pollutants or contaminants at the Site which are the subject of
11 any PA/SI and/or RI/FS conducted pursuant to this Agreement and which
12 have been or will be adequately addressed by the remedial actions
13 provided for under this Agreement.

14

15 31.2. Notwithstanding this Section, and notwithstanding Section 14
16 (Dispute Resolution), the Parties reserve the right to raise or assert
17 any defense, whether procedural or substantive, in law or equity, or to
18 raise any issue as to jurisdiction, or standing of any Party, or any
19 other matter in any proceeding related or not related to this Agreement,
20 which the Parties might otherwise be entitled to raise or assert.

21

2 32. OTHER CLAIMS

23

24 32.1. Nothing in this Agreement shall constitute or be construed as a
25 bar or release from any claim, cause of action or demand in law or
26 equity by or against any person, firm, partnership or corporation not a
27 signatory to this Agreement for any liability it may have arising out of
28 or relating in any way to the generation, storage, treatment, handling,
29 transportation, release, or disposal of any hazardous substances,
30 hazardous waste, waste, pollutants, or contaminants found at, taken to,
31 or taken from the Site.

32

33 32.2. Unless specifically agreed to in writing by the Parties, the
34 State shall not be held as a party to any contract entered into by the
35 Response Entities to implement the requirements of this Agreement.

36

37 33. STATE SUPPORT SERVICES AND OVERSIGHT COSTS

38

39 33.1. Compensation for any State support service, oversight costs and
40 expenses rendered in connection with those activities funded by the
41 USACE and the National Guard Bureau under the Defense Environmental

1 Restoration Program (10 U.S.C. Section 2701, et seq.) carried out
2 pursuant to this Agreement are governed by the Defense/State Memorandum
3 of Agreement (DSMOA), executed on May 31, 1990, between DTSC (then
4 Department of Health Services) on the behalf of the State and the
5 Department of Defense. Furthermore, compensation for State support
6 services, oversight costs and expenses rendered in connection with those
7 response activities funded by the City of Fresno shall be charged to the
8 City of Fresno consistent with provisions of DSMOA.

9
10 33.2. Total compensation from the USACE and the National Guard Bureau
11 to the State for services, expenses, or oversight activities shall not
12 exceed the percentage limit specified in the DSMOA. Due to the specific
13 characteristics of this site, it is appropriate that the City of Fresno
14 be held to the same level of compensation to the State as the other
15 governmental Response Entities. In no event shall the City of Fresno
16 pay past or current State support service costs in an amount greater
17 than one (1) percent, or the current percentage limit specified in the
18 DSMOA, of the total costs of City of Fresno funded response actions at
19 the Site consistent with the DSMOA.

20
21 33.3. Within one hundred twenty (120) days after the end of each
22 quarter of the federal fiscal year, the State shall submit to the
23 Response Entities an accounting of all State costs and expenses actually
24 incurred during that quarter in providing support services or oversight
25 activities under this Section. Such accounting shall be accompanied by
26 costs summaries and be supported by documentation which meets federal
27 auditing requirements. All costs and expenses submitted must be for
28 work relating to activities conducted under this Agreement and
29 consistent with the NCP and the requirements described in OMB Circulars
30 A-87 (Cost Principles for State and Local Governments) and A-128 (Audits
31 for State and Local Cooperative Agreements with State and Local
32 Governments) and Standard Forms 424 and 270. The Response Entities have
33 the right to audit cost reports used by the State to develop the cost
34 and expense summaries.

35
36 33.4. Except as allowed pursuant to subsection 33.5 below, within
37 ninety (90) days of receipt of the accounting provided pursuant to
38 subsection 33.3 above, the Response Entities shall, respectively,
39 reimburse the State in the amount set forth in the accounting.

40

1 33.5. In the event the Response Entities contend that any of the costs
2 and expenses set forth in the accounting provided pursuant to subsection
3 33.3, above, are not properly payable, the matter shall be resolved in
4 accordance with an audit through DSMOA.
5

6 33.6. In the event that the Site does not qualify for inclusion in
7 DSMOA, the Parties agree to reopen negotiations on this Section.
8

9 34. EFFECTIVE DATE
10

11 34.1. This Agreement shall be effective upon execution by the DTSC,
12 RWQCB, National Guard Bureau, USACE, and the City of Fresno.
13

14 34.2. Any response action underway upon the effective date of this
15 Agreement and approved by the State shall be deemed to comply with the
16 terms of this Agreement, unless all the Parties agree otherwise. Any
17 response action proposed prior to or upon the effective date of this
18 Agreement and under review by the State shall be subject to the terms of
19 this Agreement, unless all Parties agree otherwise.
20

21 35. STATE APPROVAL
22

23 35.1. Whenever State approval or the issuance of any State permit is
24 required, the State shall not unreasonably withhold such approval or
25 permit.
26

27 36. APPENDICES AND ATTACHMENTS
28

29 36.1. Appendices shall be an integral and enforceable part of this
30 Agreement. They shall include the most current versions of:

31	APPENDIX A	Agreed Responsibilities for the Response Entities.
32	APPENDIX B	Schedules for Submittal of Primary Documents.
33	APPENDIX C	Site Boundary Map.
34	APPENDIX D	Notification Addresses and Project Manager Names.
35	APPENDIX E	Model State of California Imminent or Substantial
36		Endangerment Order
37	APPENDIX F	Standard Form of Incorporation of Additional Non-
38		Governmental Parties.
39	APPENDIX G	Standard Form of Incorporation of Additional
40		Governmental Parties.

1

1 36.2. Attachments shall be for information only and shall not be
2 enforceable parts of this Agreement. The information in these
3 attachments is provided to support the initial review and comment upon
4 this Agreement, and they are only intended to reflect the conditions
5 known at the signing of this Agreement. None of the facts related
6 therein shall be considered admissions by, nor are they legally binding
7 upon, any Party with respect to any claims unrelated to, or persons not
8 a Party to, this Agreement. They shall include:

- 9 ATTACHMENT A Chemicals of Concern.
- 10 ATTACHMENT B Site History.
- 11 ATTACHMENT C Department of Health Services - State Water
12 Resources Control Board/Regional Water Quality
13 Control Boards Memorandum of Understanding.

1 Each undersigned representative of a Party certifies that he or she is
2 fully authorized to enter into the terms and conditions of this
3 Agreement and to legally bind such Party to this Agreement.
4
5
6
7

8 UNITED STATES NATIONAL
9 GUARD BUREAU

10
11 May 3, 1994
12 DATE

Raymond F. Rees
Raymond F. Rees
Major General, U.S. Army
Acting Chief, National Guard
Bureau

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20 DATE

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27 UNITED STATES ARMY CORPS OF
28 ENGINEERS

29
30
31 APRIL 1, 1994
32 DATE

John E. Schauffelberger
JOHN E. SCHAUFELBERGER
Colonel, Corps of Engineers
Division Commander

33
34
35
36
37
38
39
40 CITY OF FRESNO

41
42
43 AUGUST 30, 1994
44 DATE

Michael A. Bierman
MICHAEL A. BIERMAN
City Manager
City of Fresno

STATE OF CALIFORNIA
DEPARTMENT OF TOXIC SUBSTANCES CONTROL

Anthony J. Zandis
ANTHONY J. ZANDIS
DSMOA Technical Program Manager
Department of Toxic Substances Control

10-4-94
DATE

CENTRAL VALLEY
REGIONAL WATER QUALITY CONTROL BOARD

William H. Crooks
WILLIAM CROOKS
Executive Officer
Central Valley
Regional Water Quality Control Board

9-22-94
DATE